UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

METAL SERVICES, LLC d/b/a PHOENIX SERVICES, LLC	
and	Cases 15-CA-116456 15-CA-127259
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO	
and	
BRANDON LESSLIE, An Individual	15-CA-122910
and	
MICHAEL EMERSON, An Individual	15-CA-124412 15-CA-128288
and	
CHRIS BROTHERS, An Individual	15-CA-124883

Beau Pines, Susan Greenberg, Jacqueline Rau, Esqs.,
for the General Counsel.
W. Chris Harrison, Russell W. Jackson, Esqs.,
for the Respondent.
Bruce Fickman, Esq.,
for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Blytheville, Arkansas, on August 11- 15, and September 8-10, 2014. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union, AFL-CIO (the Union) filed the charge in Case 15-CA-116456 on November 5, 2013, an amended charge on December 13, 2013, and a second amended charge on April 1, 2014. The Union filed the charge in Case 15-CA-127259 on April 24, 2014, and amended charge on May 9, 2014, and a second amended charge on May 16, 2014. Brandon Lesslie (Lesslie) filed the charge in Case 15-CA-122910 on February 19, 2014, an amended charge on February 28, 2014, a second amended charge on April 16, 2014, and a third amended charge on May 21, 2014. Michael Emerson (Emerson) filed the charge in Case 15-CA-124412 on March 12, 2014, and an amended charge on March 24, 2014. Emerson filed the charge in Case 15-CA-128288, on May 7, 2014. Chris Brothers (Brothers) filed the charge in Case 15-CA-124883 on March 19, 2014, and an amended charge on March 31, 2014.

On May 30, 2014, the General Counsel issued a complaint and notice of hearing. On July 31, 2014, the General Counsel issued an amended consolidated complaint and notice of hearing Finally, on August 8, 2014, the General Counsel issued a second amended consolidated complaint and notice of hearing (the complaint). Metal Services, LLC d/b/a Phoenix Services, LLC (the Respondent) filed an answer denying the unfair labor practice allegations in the complaint.

On the entire record, including my observation of the demeanor of the witnesses,[1] and after considering the briefs filed by the General Counsel, the Respondent, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a limited liability company, with an office and place of business in Blytheville, Arkansas, where it is engaged in the manufacture and processing of metal products. Annually, the Respondent sold and shipped from its Blytheville, Arkansas facility goods valued in excess of $50,000 directly to points located outside the State of Arkansas and purchased and received at its Blytheville, Arkansas facility goods valued in excess of $50,000 directly from points outside the State of Arkansas. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act) and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of the testimony, and the inherent probabilities based on the record as a whole. In certain instances, I credited some, but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of the testimony of a witness. *Jerry Ryce Builders*, 352 NLRB 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.* 179 F.2d 749, 754 (2d Cir. 1950) revd. on other grounds 340 U.S. 474 (1951. See also *J. Shaw Associates, LLC*, 349 NLRB 939, 939-940 (2007). In addition, I have carefully considered all the testimony in contradiction to my factual findings and have discredited such testimony.

II. Alleged Unfair Labor Practices

The substantive allegations of the complaint allege that commencing on October 18, 2013, the Respondent engaged in numerous violations of Section 8(a)(1) of the Act in order to discourage employees from engaging in union activity, including interrogating employees about their union activities; threatening employees with discharge, job loss and the closure of facility; informing employees of the futility of organizing; creating the impression of surveillance; soliciting grievances and promising increased benefits; threatening employees with more onerous work assignments if they continued their union activities; threatening to reassign employees and reduce their pay; discriminatorily prohibiting employees from discussing the Union over its radio while permitting employees to talk about other nonunion-related subjects, and maintaining and enforcing overly broad rules which interfere with the Section 7 activities of the employees. In addition, the complaint alleges that the Respondent violated Section 8(a)(1) of the Act by: interrogating employees regarding documents they received from the NLRB; threatening employees with unspecified reprisals if they did not give the Respondent documents employees received from the NLRB; threatening to discharge, transfer, and reduce employees' pay because of documents received from the NLRB; and creating the impression among employees that their contact with the NLRB was under surveillance.

The complaint also alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Chris Brothers on October 28, 2013, and Jacob Adams on October 29, 2013. The complaint further alleges that the Respondent violated Section 8(a)(3) and (1) by issuing a 1-day suspension to Michael Emerson on November 24, 2013; issuing a written warning and 3-day suspension to Emerson on February 12, 2014; and issuing a written warning to Emerson on March 5, 2014. As amended, the complaint also alleges that the Respondent refused to permit Brandon Lesslie to work from November 22 to 29, 2013, in violation of Section 8(a)(3) and (1). Finally, the complaint alleges that the Respondent violated Section 8(a)(4), (3), and (1) by issuing a written warning and a 3-day suspension to Lesslie and refusing to allow him to work scheduled overtime on December 6, 2013; issuing a written warning to Lesslie, demoting him from a slag pot carrier operator to a pressure washer, reducing his pay and changing his hours on February 7, 2014; issuing Lesslie a 5- day suspension on February 10, 2014, and discharging Lesslie on February 14, 2014.[2]

Background

The Respondent provides support services to steel mills located throughout the United States. The Respondent operates nine nonunion facilities and five facilities where employees are represented by a union. The facility involved in the instant case is located at the Nucor Hickman steel mill in Blytheville, Arkansas, and is presently a nonunion facility. An important part of the services that the Respondent provides to Nucor at the Hickman facility in Blytheville involves the removal and processing of material referred to as "slag" that is generated through the

[2] On September 8, 2014, the Regional Director for Region 15, on behalf of the National Labor Relations Board, filed a petition for an injunction under Section 10(j) of the Act regarding the allegations in the complaint in the United States District Court, Eastern District of Arkansas in Case 3:14-CV-00211. I have taken administrative notice of the fact that on December 8, 2014, United States District Court Judge D. P. Marshall, Jr. issued an order on the record denying the petition for an injunction, without prejudice.

steelmaking process. On May 29, 2013, the Respondent assumed the support services at the Nucor Hickman facility in Blytheville from another entity, Harsco. At the time of the hearing, the Respondent employed approximately 90 employees at the Hickman facility, who worked in various classifications that include: pot carrier operators; pit loader operators; rail crane operators; power washers; and mechanics.

When the Respondent took over the support services at the Nucor Hickman facility on May 29, 2013, it hired all of the Harsco supervisors and employees. After the transfer of the operation to the Respondent the following individuals comprised the supervisory staff at the Respondent's Hickman operations: Rodney Barnes, general manager; Chris Teeter, manager of mill services; Mike Ross, scrap line supervisor; Ken Mitchell, safety manager; and Mike Shackells, maintenance supervisor. Barnes reported to Tony Cunningham, the Respondent's director of operations-West. Gail Klee is the Respondent's human resources director and is located at the Respondent's corporate office in Kennett Square, Pennsylvania.

At the Respondent's Hickman facility the following individuals held the position of lead man and constituted the Respondent's first line of supervision: Ronnie Rountree; James Knuth; David Thompson; David Perry; and Andrew Ashley. The Respondent admitted that all of the above-noted individuals are supervisors within the meaning of Section 2(11) of the Act.

Because much of this case involves the Respondent's slag operations at the Nucor Hickman facility, it is necessary to briefly describe this process at the outset. During the steelmaking process, slag is poured from the furnace into a large steel pot, with the capacity to hold approximately 900 cubic ft. of material, which is placed underneath the furnace. These pots are removed after a furnace pour by a pot carrier operator, operating a large specialized vehicle. The pot carrier operator takes the slag pot to a slag pit located on the Nucor property. The pot carrier operator pours the slag from the top of an incline into the pit. After this slag is poured out by the pot carrier operator, it is then spread out in order to cool by pit loader operators using front-end loaders. The pot carrier operator then returns to the furnace and places an empty pot in place, awaiting the next furnace pour. This process is constantly repeated throughout the shift. After the slag cools, it is processed into various products which are either sold back to Nucor for use in the steel mill or to third parties for use in projects such as road construction.

The Beginning of the Union Campaign

In June 2013, employee Michael Emerson and other employees began to talk about having a union at the Hickman facility. According to Emerson, who was employed as a pot carrier on C crew,[3] in early July 2013, while at work, he asked his leadman, Ronnie Rountree, what Rountree thought about a union coming in. Rountree replied that "if a union was to come in here, Nucor would shut us down." Rountree also mentioned that employees had tried to have a union at Harsco once and it did not happen and it was not happening this time either. Rountree testified that while he could not recall the date, he recalled that Emerson asked him if he had any dealings with a union and he said that at Harsco employees tried to get it in. Rountree said that it

[3] The Respondent's operations at the Nucor Hickman facility operate on a 24-hour-a-day basis. In order to staff its slagging operation, the Respondent has 4 crews, A, B, C, and D, which work 12-hour shifts on a rotating basis.

did not go over to well when it was tried before and he did not think it would now. Rountree also told Emerson that Nucor was not happy about the idea of a union being there.

To the extent there is a conflict between the testimony of Emerson and Rountree, I credit Emerson's version of this conversation. I found Emerson to be a credible witness. He testified in a forthright and detailed manner and his demeanor reflected certainty regarding the matters that he testified to. On the other hand, Rountree testified in a generalized manner without any detail and his demeanor reflected uncertainty.

There is no specific complaint allegation in the second amended consolidated complaint regarding the spread of plant shutdown made by the Respondent, through Rountree, in early July 2013. I specifically advised the General Counsel at the hearing that if there were any amendments to be made alleging additional unfair labor practices, beyond those alleged in the complaint, such amendments would have to be made prior to the closure of the General Counsel's case-in-chief. I indicated I would not consider any claims of additional unfair labor practices, beyond those specifically alleged in the complaint, unless such an amendment was made. (Tr. 806-807.) There were not any complaint amendments made by the General Counsel at the hearing specifically adding unfair labor practice allegations beyond those alleged in the complaint. This discussion between Emerson and Rountree precedes by several months the allegations regarding threats of plant closure that are alleged in the complaint. Thus, there is an insufficient relationship between this incident and the allegations of the complaint for me to consider whether Rountree's statements constitute a violation of Section 8(a)(1) of the Act.. I have considered the statements, however, as background and find that Emerson's discussion with Rountree establishes that the Respondent had knowledge of union activity as early as July 2013 and expressed animus toward the union activity of its employees.

Undeterred by Rountree's statements, shortly afterward Emerson called the main office of the Union in Pittsburgh, Pennsylvania, in order to obtain more information about the Union. In late August or the beginning of September 2013, Emerson met with Union Representative Bill Fears at a restaurant in Blytheville and discussed generally with him starting an organizing campaign among the employees at the Respondent's Hickman operation. At this point, Emerson's discussions about the Union were generally with other employees on the C crew. In October 2013, Rountree was the leadman for the C crew. The employees on the crew included Emerson, pot carrier operator Brandon Lesslie, rail crane operators Aaron Booker and Johnny Payne, pit loader operator, Chris Brothers, and utility man Coby Kimbrell. Jacob Adams had been hired as a pit loader operator and was being trained by Brothers. On October 18, Brothers was promoted to be a pot carrier operator on D crew and Adams replaced Brothers as a regular pit loader on the C crew.

Whether the Respondent Discriminatorily Prohibited Employees from Discussing the Union Over the Radio

Paragraph 7(a) of the complaint alleges that the Respondent violated Section 8(a)(1) of the Act in October 2013, by discriminatorily prohibiting employees from discussing the Union over the radio.

On October 18, prior to the shift change at 6 p.m., Brothers, Lesslie and Emerson were in the scrap office preparing paperwork for the beginning of their shift. They were discussing the Union when Rountree walked in. Brothers testified that the employees continued their discussion in the presence of Rountree and asked him what he thought about a union. Rountree responded by saying that he did not "want to fucking hear about it." He added that he did not want to hear them talking about the Union over the radio and to get out of his office. The three employees then left the office. Rountree did not testify specifically regarding this conversation. I credit Brothers' uncontradicted testimony regarding this discussion.

The machinery that the Respondent's employees utilize at the Nucor facility contains two-way radios that employees use to communicate with each other and supervision. There are several different channels on the radio. For example, channel 1 is Nucor's channel and is used strictly for work-related conversations. Channel 7 is the "Phoenix" channel and is used by the Respondent's employees to communicate with each other. According to the credited testimony of Emerson, channel 15 is an "all talk" channel on which employees from both Nucor and the Respondent are permitted to discuss a variety of personal topics such as politics, fishing, hunting, and the sale of personal items. According to Emerson, the only restriction he was aware of is that the employees were not to use "cuss" words. There is no evidence that in October 2013 the Respondent had any other rules regarding limitations on the use of channel 15.

The evidence is clear that in October 2013 the only limitation on employee use of channel 15 was a prohibition regarding profanity. Rountree's broad prohibition of any talk about the Union on the radio on October 18, did not limit that restriction to channel 1 or channel 7 and could reasonably be construed by employees to apply to channel 15. By singling out union activity as the only restriction on the use of channel 15, the Respondent discriminatorily prohibited employees from using the radio to discuss union activity and accordingly violated Section 8(a)(1) of the Act. I find that *Churchill's Supermarkets*, 285 NLRB 138 (1987), is supportive of this conclusion. In that case, the Board found that the employer's discriminatory refusal to permit employees to use the company phones for discussions about the union, when it permitted employees to use company phones for all other personal matters, violated Section 8 (a)(1). Id. at 139 and 155-156. I note that the Board's recent decision in *Purple Communications, Inc*., 361 NLRB No. 126 (2014) cited with approval the Board's finding in *Churchill's* that the employer discriminatorily applied its rule regarding the use of its telephone equipment. *Purple Communications, Inc*., supra, slip op .at 9 and fn. 42.[4]

The Union Meetings on October 21 and 22, 2013

On Sunday, October 20, Emerson met with Union Organizer Dionisio Gonzalez at the

[4] The Board indicated in its decision *Purple Communications, Inc*. supra, at fn. 13 that it did not reach the definition of discrimination set forth in *Register Guard*, 351 NLRB 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571F.3d 53 (D.C. Cir. 2009). I note that even under the Board's definition of discrimination in the use of employer-owned equipment set forth in *Register Guard*, however, a violation of Section 8(a)(1) is established in this case. As noted above, the Respondent permitted the use of channel 15 on its radios for a variety of nonwork-related discussions, other than solicitations. Thus, Rountree's broad admonition that employees could not use the radio to discuss the Union, without limiting any other use, discriminated along Section 7 lines and therefore violated Section 8(a)(1). *Register Guard*, supra at 1119.

Hampton Inn in Blytheville and discussed with him starting a union organizational drive among the Respondent's employees at the Hickman facility After meeting with Gonzalez, Emerson spoke to several of his coworkers on C crew, including Jacob Adams, Chris Brothers, Brandon Lesslie, and Donnie Jones about meeting with Gonzalez at the Hampton Inn.

On Monday, October 21, Emerson, Adams, and Kimbrell met with Gonzalez at the Hampton Inn at approximately 6:45 p.m. Gonzalez gave the employees a union pamphlet regarding organizational rights (GC Exh. 7), and blank authorization cards for employees to give to other employees. Gonzalez also gave the employees his business card. Emerson signed an authorization card and gave it back to Gonzalez.

On Tuesday, October 22, Emerson, Brothers, Lesslie, and Donnie Jones attended a meeting with Gonzalez at the Hampton Inn. Gonzalez again gave the employees who were present the union pamphlet on organizational rights and his business card. Gonzalez also gave the employees authorization cards to sign. In addition, Gonzalez gave the employees blank authorization cards in order for them to solicit other employees to authorize the Union as their representative. At the meeting, Lesslie signed an authorization card (GC Exh. 47) and gave it back to Gonzalez.

Whether the Respondent Violated Section 8(a)(1) by its Conduct on October 22-23, 2013

There are numerous complaint allegations that the Respondent violated Section 8(a)(1) through different supervisors during this period.

The Conversation Between Rountree and Jones on October 22

Former employee Donnie Jones,[5] testified that after he left work on October 22 and was driving to the union meeting, he received a telephone call from Rountree, who asked him if he knew about the union meeting and whether he was going to it. Jones denied having any knowledge of the meeting. After speaking with Rountree on the phone, Jones went to the union meeting at the Hampton Inn and met with Gonzalez, Emerson, Brothers, and Lesslie. After the meeting, Jones reported to the other employees that Rountree had called him and asked him if he knew about the union meeting.

At the hearing, Rountree denied asking any employees to tell him about a union meeting. I credit Jones with regard to his telephone conversation with Rountree on October 22. Jones testified in a detailed and forthright manner and his demeanor reflected sincerity. While Jones testified on cross-examination that no supervisor or manager questioned him about the Union, on redirect examination he clarified his testimony by indicating that since Rountree was a lead man, Jones did not view him as a supervisor or manager. As I have noted above, I was not impressed with the quality of Rountree's testimony.

In *Scheid Electric*, 355 NLRB No. 27 slip op. at 1 (2010) the Board indicated, in deciding whether the questioning of an employee violates Section 8(a)(1), it determines:

[5] Jones had voluntarily left his employment with the Respondent in late November 2013.

> "[w]hether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center.,* 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered in making such an analysis are the identity of the questioner, the place, and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter.

In *Intertape Polymer Corp.,* 360 NLRB No. 114 (2014) the Board also applied the above-noted factors in finding the questioning of an employee to be an unlawful interrogation

Applying the factors set forth by the Board in *Scheid Electric*, *Intertape Polymer,* and *Rossmore House*, it is clear that the questioning of Jones is coercive. In this regard the questioner, Rountree, was Jones's immediate supervisor. The questioning occurred in the context of the Respondent committing a number of other unfair labor practices and, at this point, Jones was not a known union supporter. The Respondent had no legitimate right to inquire as to whether employees know about the union meeting and whether they were attending. *Sorensen Lighted Controls, Inc*., 286 NLRB 969 (1987). Applying these principles, I find that the Respondent, through Rountree, unlawfully interrogated Jones in violation of Section 8(a)(1) regarding his knowledge of the union meeting and whether he was going to attend it as alleged in paragraph 9(a) of the complaint.

The Safety Meetings Conducted by Ken Mitchell on October 23

The Respondent's safety manager, Ken Mitchell, conducted a safety meeting on October 23, with approximately 10 employees on the A crew. Current employee Brandon Razer, who testified on behalf of the General Counsel pursuant to a subpoena, testified that at this meeting, C. J. Teeter[6] asked Mitchell, "What is this I am hearing about a union." Mitchell replied that "You can get your fucking ass run out of here talking about the union." (Tr. 828, 851.)

Around the same time, Jones testified that he attended a safety meeting conducted by Mitchell that was attended by the C crew. Jones recalled Emerson, Lesslie, Brothers, and Payne attended the meeting that was held in the Respondent's safety office.[7] According to Jones, at this

[6] C.J. Teeter is a nonsupervisory employee and the son of Chris Teeter, an acknowledged supervisor.

[7] Jones testified that the meeting occurred shortly before he left his employment in November 2013 but did not testify as to the precise date. However, Jones clearly recalled Brothers being present at the meeting. The record establishes that Brothers was suspended on October 25, 2013, and discharged on October 28, 2013. I find, based on the record as a whole, that this safety meeting occurred on or about October 23, 2013.

meeting Mitchell said that Nucor did not want the Union to come in and that the employees who were trying to get the Union would be fired.[8]

Mitchell testified that he recalled conducting a safety meeting on October 23 in which C. J. Teeter asked him what his thoughts were about the "union talk" that was going on. Mitchell replied that Nucor was not fond of unions and that Phoenix could lose the contract and if it lost the contract "we would all be out of a job." Mitchell specifically denied that he ever told Jones that employees would be fired if they engaged in union organizing.

I credit Razer and Jones regarding the two safety meetings noted above to the extent their testimony conflicts with that of Mitchell. Their testimony was detailed and their demeanor while testifying demonstrated a sincere effort to testify truthfully. In addition, Razer is a current employee who testified against the interest of his employer and it is therefore unlikely that his testimony would be false. *Avenue Care & Rehabilitation Center*, 360 NLRB No. 24, slip op. 1 fn. 2 (2014).

Mitchell acknowledged making statements that Nucor did not want the Union to come in and the possibility of job loss if the employee selected the Union. In this regard, Mitchell appeared to portray Nucor as the entity that was opposed to the Union, rather than the Respondent, in an attempt to buttress the Respondent's position. I specifically do not credit Mitchell's denial that he told Jones that employees would be fired if they engaged in union organizing.

Based on the credited testimony of Jones and Razer, I find that the Respondent, through Mitchell, violated Section 8(a)(1) by threatening employees with discharge for engaging in union activity as alleged in paragraph 10(b) of the complaint. I note that even under Mitchell's version of the statements that he made at the safety meetings, a violation of Section 8(a)(1) is established. In *NLRB v. Gissell Packing Co*., 395 U.S. 575 (1969), the Supreme Court held that an employer's prediction as to what effects unionization may have on its company is lawful only where it is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization." Id. at 618. In the instant case, there is no evidence to support Mitchell's statement that Nucor was opposed to the unionization of the Respondent's employees. Thus, there are no objective facts to support Mitchell's statement.

[8] During cross-examination, the Respondent established that Jones' affidavit that was dated March 18, 2014, indicated "The meeting was conducted by safety officer Ken Mitchell. I remember that Mitchell said that Nucor did not want union workers. He said that they would kick us off the property. I cannot remember anything else that was said." (Tr. 752.) On redirect examination, however, Jones testified that Mitchell stated "[T]hat the people that were trying to get the Union in would be fired." (Tr. 753.) Jones further testified that that statement was not contained in his affidavit because he probably forgot to tell the Board agent. I credit Jones' testimony at trial over the statement contained in his pretrial affidavit. At the trial, Jones appeared to testify in a complete and thorough manner and I credit his explanation that he forgot to tell the Board agent during the taking of the affidavit the entirety of the statement that Mitchell made.

The Conversation Between Rountree and Lesslie on October 23

Paragraph 9(a) of the complaint alleges that about October 22 or 23, 2013, the Respondent, through Rountree, interrogated employees about their union activities. Paragraph 9 (b) alleges that during this same period of time, the Respondent, through Rountree, threatened its employees with discharge because they engaged in union activity.

According to the testimony of Brandon Lesslie, around lunchtime on October 23, 2013, Rountree called Lesslie, who was on vacation at the time. Rountree told Lesslie that Barnes, Teeter and Ross had been looking into the interest of the employees for the Union and thought that it was just C crew. Rountree added that Barnes, Teeter, and Ross had been questioning him about it and they wanted to know who had attended the union meeting. Lesslie told Rountree that it was more than just C crew. Rountree said a union would never work at the facility as Nucor would not allow it. During the conversation, Rountree said that Lesslie's name had come up as the " ringleader" of the Union. Lesslie denied that he was the ringleader. Rountree told Lesslie to get a hold of Teeter. When Lesslie asked Rountree if he was going to be fired, Rountree replied that he did not know.

Rountree did not testify specifically regarding the phone conversation with Lesslie on October 23. Rountree testified generally that Lesslie brought up the subject of a union with him and that he told Lesslie that "the mill wasn't pleased or happy with the idea. I don't think it would go over too well." Rountree specifically denied that he ever asked any employees about a union meeting or that he ever discussed with any employee about being the "ringleader" of the Union.

I credit Lesslie's testimony over that of Rountree. Lesslie's testimony was specific and detailed and his demeanor reflected certainty with respect to this conversation. I find Leslie's testimony to be more reliable than Rountree's somewhat perfunctory denials. Accordingly, I find that on October 23, 2013, the Respondent, through Rountree, unlawfully interrogated Lesslie in violation of Section 8(a)(1) by asking him who had attended the union meeting. As noted above, Lesslie asked Rountree if he would be fired for engaging in union activity and Rountree replied that he did not know. I find that Rountree's response is insufficient to constitute a threat of discharge for engaging in union activity and accordingly I shall dismiss that allegation in the complaint.[9]

The Conversations Between Lesslie, Teeter, and Barnes on October 23

Lesslie testified that while he was in his car with his girlfriend at approximately 2 p.m. on October 23, he returned a missed phone call from Teeter. Teeter asked him what was going on with the Union. Lesslie replied that employees had gone to a meeting with the Union. Teeter asked Lesslie why employees would open up the Company and have the Union come in when they are all grown men and did not need to have somebody come in and tell them how to do their jobs. Teeter then asked who attended the union meeting and said that he thought that Lesslie was

[9] I note that the complaint does not allege that any statements made by Rountree created the impression of surveillance of employees' union activities and accordingly I will not make any findings that that such an unfair labor practice occurred by virtue of Rountree's statements.

the "ringleader." Lesslie told Teeter that he attended a meeting but he was not the ringleader of the union movement. Teeter told Lesslie that Nucor would never allow a union to be onsite. Lesslie replied that he did not believe that Nucor would shut them down if the employees brought in a union. Lesslie added "There is other union mills out there and they have not shutdown." Teeter told Lesslie he was looking into the support for the Union and was going through his list.

Teeter told Lesslie that he wanted him to come over and meet him at the facility. When Lesslie stated that he did not want to, Teeter told him it would be in his best interest to do so. Lesslie told Teeter he had his girlfriend with him and he could not take her into the facility as guests were not permitted. Teeter told Lesslie to meet him in the Respondent's parking lot.

When Lesslie arrived at the parking lot it was around the shift change at 3:30 p.m. Teeter again spoke to him by phone and told Lesslie that Barnes was also going to attend their meeting. Teeter told Lesslie to meet them at the parking lot of the Good Earth pallet facility that was located near the Nucor steel mill. Lesslie did as he was instructed.

Barnes and Teeter drove into the Good Earth parking lot in a company truck. As Lesslie approached them they asked Lesslie to get in the back seat. Barnes was in the driver's seat and Teeter was next him in the front passenger seat. Lesslie got into the middle of the back seat between Barnes and Teeter. Teeter began the conversation by asking Lesslie what was going on with the Union. Barnes added that the "We're a new company. We have not been here 6 months, and you all want to open up for the union to come in here."

Lesslie told Teeter and Barnes that the employees had tried talking to them regarding the bonus that employees were told they were going to get. Lesslie mentioned that employees had never received an employee handbook and that they thought the vacation system was unfair. Leslie also said that employees did not like having to park in the present parking lot and then take a bus into the facility.

Barnes stated that all the employees were operating brand-new equipment. Barnes also stated that bringing in a union would not work, because he had only so much money to pay bills. Barnes stated that if the employees continued with their campaign and the Union "won" and employees got more money, the Respondent would have to cut jobs. Barnes said they might have to use one pot carrier instead of two. Teeter also stated that with union employees may make more money and better benefits, but they might have to downsize to cover the expense and cut somebody's job.

Lesslie testified that he observed that Teeter had a yellow pad with him. From his position behind Teeter and Barnes, Lesslie could see that it was a detailed list with the names of the employees on the four crews and other employees such as mechanics. Teeter showed Lesslie the list. It contained a mark by each named indicating "yes," "no," or a question mark. Teeter said they had been looking into "it" to see if they had enough votes to win.

Lesslie also observed that Teeter had another list of white paper that showed the names of several employees. Lesslie observed on this list the names of Michael Emerson, Chris Brothers, Donnie Jones, Jacob Adams, Coby Kimbrell, Brandon Razer, Brandon Lesslie, and some others.

Emerson, Adams, Jones, and Brothers had stars next to their names while Lesslie's name was underlined.

Teeter told Lesslie that if the Respondent's employees organized, Nucor "would run us off. They would shut down. They would close the gate." Lesslie responded that he did not believe that Nucor would shut down because the Respondent's employees wanted to unionize. Lesslie said, "There's other unions out there at Nucor steel, and they did not shut down when they unionized." Barnes replied that the Respondent could shut Nucor down because the Respondent was the largest contractor on the site and that "we can shut them down if we went on strike."

When Teeter and Barnes asked which employee had called the Union, Lesslie would not tell them. He said that if they wanted to know they should ask somebody else. Teeter and Barnes asked him to talk to the employees involved and also asked him if he could call the union representative to come down and get the campaign stopped. Lesslie replied that he could not do that because it was not up to him.

Lesslie testified that when he got into the truck with Teeter and Barnes, he had in his hand the union pamphlet that Gonzalez had given him regarding organizational rights (GC Exh. 7). Lesslie also had with him Gonzalez' business card (GC Exh. 31) and a blank union authorization card. Barnes asked Lesslie if he could see the pamphlet because he was curious as to where the Union was from. Lesslie gave Barnes the pamphlet and both Barnes and Teeter reviewed it. They told Lesslie there was no information as to where the Union was located on it. Lesslie then took from his wallet Gonzalez' business card and a blank union authorization card. Teeter asked if he could see the business card. Lesslie gave both cards to him and Teeter wrote down some information from the business card.

Lesslie told Teeter and Barnes that the pamphlet indicated the employees had the right to talk about the Union on breaks and that they were protected if they signed a union card. Barnes replied that he could not fire an employee for joining a union, but he can fire an employee for scuffing a tire or putting a scratch on the paint. Barnes also stated "[H]e can demote people, he can move people around, he can run one pot carrier, he can change the rate of pay, he can do what he wanted." (Tr. 350.)

Barnes told Lesslie to tell employees that it was going to get better, that they were going to get an incentive bonus, a 401(k) plan and a new parking lot. He also said they were working on employee handbooks. Barnes and Teeter told Lesslie that they were going to work through this together. Barnes then asked Lesslie if he still wanted to be in a union, Leslie replied that he wanted to be in a strong union. While Barnes and Teeter returned the union pamphlet to Lesslie, they did not return Gonzalez' business card or the blank authorization card to him. Barnes told Lesslie that if he signed the union card that meant that he was for the Union and that if he did not sign it, that means he was not for the Union. At that point, the conversation ended and Lesslie left the truck.

In his testimony, Teeter admitted that he and Barnes met with Lesslie in a company truck at the Good Earth pallet factory; although Teeter testified that the meeting occurred on Friday, October 25. Teeter testified that Lesslie requested to meet with him and Barnes and asked them

to bring him his paycheck.[10] Teeter did not mention anything in his testimony, however, as to the reason that Lesslie wanted to meet with both him and Barnes. Teeter sent a text message to Lesslie's phone on Friday, October 25, at 12:14 p.m. indicating that that the checks were arriving. (R. Exh. 17C.)[11] Teeter testified that he and Barnes went to the employee parking lot and saw that another supervisor, David Perry, was actually handing the checks out to employees. Teeter obtained Lesslie's check from Perry and drove over to where Lesslie was parked. Lesslie told them that he had just spoken to Brothers and found out that he had been suspended for 5 days and he wanted to talk to them about it. Lesslie asked if there was some other place that they could go and talk because all of the other employees are watching them. Either Teeter or Barnes suggested that they go to the Good Earth parking lot to meet.

According to Teeter, when they arrived at the Good Earth parking lot, Lesslie got into the back seat of the truck that Barnes and Teeter were in and said that he knew that Brothers had received a 5-day suspension and told them that he was worried about his own job. Lesslie said that he had gone to the union meeting and was worried that Barnes and Teeter were going to get mad at him. Teeter testified this was the first that he had heard that a union meeting had occurred. Lesslie said at the meeting the employees went over the list and discussed who was going to vote one way or another regarding the Union.

Teeter admitted that he had a yellow writing pad with him at the time. He referred to it as a "community note pad" that had writing from several managers on it. Teeter testified that there were names of pot carrier operators listed in this document (R. Exh. 15P) that he used for scheduling purposes. Teeter also testified that he had a white notebook with him that contained the names of the employees on Crews, A, B, C, and D that he was using to schedule crew rotations. (R. Exh. 16C.) Teeter specifically denied that he had a list that indicated union supporters.

According to Teeter, Lesslie complained about having to ride a bus from the parking lot and asked about when employees would receive a 401(k) plan and a handbook. Teeter replied that the handbook was in the "works" as it was being revised. Teeter indicated that they missed the open enrollment period for the 401(k). Teeter said that the Respondent planned to establish a bonus program similar to what Harsco had.

Teeter denied that Lesslie had a copy of the union pamphlet. Teeter testified that when Barnes said that he did not believe that there was a union, Lesslie pulled out an authorization card to show him that there was. Teeter recalled Barnes saying that Nucor had previously stated that if the Respondent interrupted its business, "They would shut the gates down. They would put us out, the whole company, would shut us down and be done with it."

Barnes testified that on October 25, Teeter told him that Lesslie wanted them to bring him his check and talk to him. According to Barnes, Lesslie told Teeter that he did not want

[10] The Respondent changed payroll providers in late October 2013. Because of this, direct deposit was not available for the paycheck on October 25, 2013 and all employees were issued an actual check.

[11] Lesslie testified that he did drive to the facility to pick up his paycheck but it was a couple of days after he met with Barnes and Teeter at the Good Earth parking lot. Lesslie indicated that when he picked up his check he saw Brothers and Brothers told him that he had been given 5 days off with the intention of termination.

anybody to see him talking to them, so they met at the Good Earth parking lot. Lesslie got into the backseat of the truck and Teeter asked him what was going on. Lesslie replied that he had received a call from Brothers that day and that Brothers told him he was going to lose his job. Barnes said he did not remember much about the conversation but that Lesslie said that he was not involved with the Union and told them he had nothing to do with it. Lesslie did say that he went to a union meeting the night before. Barnes did not recall him mentioning the names of other employees who attended. Barnes testified that he did say he did not believe there was a Union. At that point Lesslie pulled out a union authorization card and showed it to Barnes. According to Barnes, at that point he believed that there was union activity among the employees.

Barnes recalled Lesslie complaining about having to take the bus from the parking lot. Barnes told him that he could not do much about that as it was something that would have to be worked out with Nucor, but that it would probably happen. Barnes did not recall any discussion about the employee handbook. Barnes also recalled telling Lesslie that the last time Harsco had a union campaign, Nucor issued a letter saying if there was any interruption in service, Nucor would terminate Harsco. Leslie replied that Nucor had an electrical contractor that had a union at each of its facilities. Finally, Barnes denied that he and Teeter had a list of employees who supported the Union and that he did not ask Lesslie any questions about the Union in their meeting.

I credit the testimony of Lesslie over that of Teeter and Barnes regarding their conversation in the Good Earth parking lot. Lesslie testified about his conversation in a detailed and comprehensive fashion. His testimony was consistent on both direct and cross-examination. His testimony was also inherently plausible when considered in the context of the record as a whole. During his testimony regarding this meeting, Lesslie's demeanor reflected a sincere effort to be complete and truthful.[12] On the other hand, I found that Barnes and Teeter were not credible with regard to this conversation. I found their testimony to be entirely implausible. In their version of this conversation, Lesslie wanted both of them to come and bring him his paycheck and speak to him about and unknown matter. I simply do not believe that the two highest ranking management officials at the facility would leave their tasks and bring Lesslie his paycheck and then leave the site at Leslie's request and go to and offsite parking lot to talk merely because Leslie wanted to do so. In addition, I found their demeanor to be unconvincing. In my view, they testified in a manner demonstrating a desire to support the Respondent's position in this matter.[13]

[12] As I indicate later in this decision, there are other portions of Lesslie's testimony which I do not find to be credible. As I noted at the outset of this decision, however, it is well recognized that it is not unusual for a judge to believe some, but not all, of the testimony of a witness.

[13] I do not credit the testimony of Brothers that during the week of October 21, while he was in the Respondent's office area, he overheard Barnes on the speakerphone asking Lesslie questions about the Union. I also do not credit Brother's testimony that on Friday, October 25, he overheard Teeter on the speakerphone speaking to Leslie and tell him that "we got a list. I know who went." Brothers acknowledged that Teeter's door was closed when he allegedly heard this conversation. With respect to the Barnes conversation, Brother's testimony is not corroborated by Lesslie. Leslie testified he spoke to Teeter on the phone on October 23, not Barnes. With respect to allegedly overhearing a conversation between Teeter and Lesslie on October 25, Brothers acknowledged that Teeter's door was closed during this conversation. In addition, this aspect of Brother's testimony is also not corroborated by Lesslie. Leslie did not testify that he had any conversation with Teeter involving the Union on October 25.

Paragraph 9 of the complaint alleges that on October 22 or 23, 2013, the Respondent through Barnes and Teeter violated Section 8(a)(1) in various respects. Based on Lesslie's credited testimony I find that during the phone conversation between Teeter and Lesslie on Wednesday, October 23, 2013, and the meeting between Lesslie, Barnes, and Teeter in the parking lot of the Good Earth pallet factory occurred later that same day, and that the Respondent, through Teeter and Barnes, committed several unfair labor practices as alleged in the complaint.

Paragraph 9(a) alleges that the Respondent interrogated employees in violation of Section 8(a)(1) of the Act. It is clear that under the standards set forth above in *Scheid Electric*, *Intertape Polymer*, and *Rossmore House,* that the Respondent, through Teeter, unlawfully interrogated Lesslie in violation of Section 8(a)(1) of the Act by asking him what was going on with the Union and who had attended the union meeting during their telephone conversation on October 23. During the meeting between Barnes, Teeter, and Lesslie in the company truck at the Good Earth parking lot, the Respondent committed additional violations of Section 8(a)(1) by unlawfully interrogating Lesslie. In this connection, when Lesslie got into the truck Teeter again asked him what was going on with the Union. Later in the conversation, Teeter and Barnes asked Lesslie which employee had initially called the Union. Barnes also asked Lesslie if he could see the union pamphlet and business card of Union Agent Gonzales. Barnes also asked Lesslie if he could call Gonzales and get the campaign stopped.[14] Finally, near the end of the conversation, Barnes asked Leslie if he still wanted to be in a union.

Paragraphs 9(g) and (h) allege that the Respondent engaged in conduct that constitutes the creation of the impression of surveillance in violation of Section 8(a)(1) of the Act. During their telephone conversation on October 23, Teeter told Lesslie that he thought that Lesslie was the ringleader of the Union and that he was looking into the support for the Union and was going through his list. During their meeting in the company truck in the Good Earth parking lot, Teeter told Lesslie that he and Barnes had been looking into "it" to see if they had enough votes to win. Teeter showed Lesslie a yellow pad that contained a detailed list with the names of the employees on the four crews and other employees at the facility, such as mechanics. The list contained a mark by each named indicating "yes," "no," or a "?". Teeter also had another list on white paper that contained a list of the employees that had attended the union meetings with Gonzalez.

In *Greater Omaha Packing Co*., 360 NLRB No. 62 slip op. at 3 (2014), the Board held that:

> The test for determining whether an employer has created an impression that its employees' [protected] activities have been placed under surveillance is whether the employees would reasonably assume from the employer's statements or conduct that their [protected] activities had been placed under surveillance." *Donaldson Bros. Ready, Inc*., 341 NLRB 958, 963 (2004). When an employer tells employees that it is aware of their protected concerted activities, but fails to

[14]The Respondent's request that Lesslie call the Union and ask that the campaign be stopped is also prohibited interference with the right of employees to organize in violation of Section 8(a)(1) of the Act as alleged in paragraph 9(j)(1) of the complaint. *Adderley Industries,* 322 NLRB 1016, 1024 (1997).

> tell them the source of that information, it violates Section 8(a)(1) "because employees are left to speculate as to how the employer obtain the information causing them reasonably to conclude that the information was obtained through *employer* monitoring." (Emphasis in original) (Citations omitted).

Applying that standard, it is clear that Teeter's statements to Lesslie created an unlawful impression of surveillance in violation of Section 8(a)(1) of the Act. It is equally clear that showing Lesslie a list of employees indicating the manner in which the Respondent felt they would vote in a Board election and a list of the names of the employees who had attended the union meetings, also served to create the impression that the employees' union activities were being monitored by the Respondent in violation of Section 8(a)(1) of the Act. See *Adderley Industries,* supra at 1024.

Paragraph 9(f) of the complaint alleges that the Respondent informed its employees that it would be futile for them to select the Union as their bargaining representative. As noted above, during a telephone conversation on October 23, Teeter told Lesslie that Nucor would never allow a union to be onsite. As noted previously, there is no record evidence establishing that Nucor opposed union representation of the employees of its contractors. Thus, it is clear that Teeter's statement is not an accurate prediction based on the objective facts. Rather, it is a warning that the employees' efforts to select a union to represent them would be futile and accordingly violates Section 8(a)(1) of the Act. *Atlas Microfilming*, 267 NLRB 682, 685-686 (1983).

Paragraphs 9(d) and (e) of the complaint allege the Respondent told its employees that the Respondent would shut down and cut jobs if employees continued to engage in union activity. During the conversation at the Good Earth parking lot, Barnes said that bringing in a union "would not work, because he had only so much money to pay bills." He added that if the employees continued with their campaign and the Union "won" and employees got more money, the Respondent would have to cut jobs. Barnes said that they might have to use one pot carrier instead of two. Teeter stated that with a union employees may make more money and have better benefits but that the Respondent might have to downsize to cover the expense and "cut somebody's job." Teeter also told Lesslie that Nucor, "would run us off. They would shut down. They would close the gate." When Lesslie responded that he did not believe that Nucor would shutdown because the Respondent's employees wanted to form a union. Barnes replied that the Respondent could shut Nucor down because it was the largest contractor on the site and that "we can shut them down if we went on strike."

The explicit threats made by Barnes and Teeter of the Respondent's closing its operation and job loss if the employees selected the union were not supported by any objective evidence Accordingly, those statements violate Section 8(a)(1) of the Act. *NLRB v.Gissell Packing Co*., supra at 618-620; *Rainbow Painting*, 330 NLRB 972 (2000); *Reeves Bros*., *Inc*., 320 NLRB 1082, 1082-1084 (1996). I also find that Barnes' statement that the Respondent's employees could shut down Nucor if they went on strike because the Respondent was the largest contractor on the site, is an unlawful implied threat and violates Section 8(a)(1). There is no objective evidence to support Barnes' statement. In effect, Barnes impliedly threatened that the selection of a union would inevitably lead to a strike and the closure of facility and the resulting loss of jobs. *Homer D. Bronson, Co*., 349 NLRB 512, 512-514 (2007). I note that employees would reasonably construe Barnes statement in that manner since it occurred in the context of explicit

threats of the closure of facility and the loss of jobs. Accordingly, I find that Barnes' statement that because the Respondent was the largest contractor at the Nucor site a strike by the Respondent's employees would shutdown the entire facility is an implied threat of the closure of facility in violation of Section 8(a)(1) of the Act.

Paragraph 9(i) of the complaint alleges that the Respondent solicited employee grievances, and promised employees increased benefits, and improved terms and conditions of employment if they refrain from union organizational activity. When Teeter and Barnes began the discussion with Lesslie, Teeter asked him what was going on with the Union. Barnes added that the Respondent had not been there for 6 months and the employees wanted a union to come in. This prompted Lesslie to indicate that the employees had tried talking to them about the bonus that they were told they were going to receive. Lesslie also mentioned that the employees had never received an employee handbook and they thought the vacation system was unfair. Finally, Lesslie indicated that the employees did not like having to park in the present parking lot and then take a bus into the facility.

In response to the complaints and grievances raised by Lesslie, Barnes indicated that conditions were going to get better. Barnes specifically indicated that employees were going to receive an incentive bonus, a 401(k) plan, and a new parking lot. Barnes added that the Respondent was working on providing new employee handbooks. Barnes and Teeter told Lesslie that they were going to work through this together. There is no evidence that previous to this meeting the Respondent had a practice of soliciting complaints from employees. Accordingly, I find that by soliciting grievances from employees and promising to remedy them the Respondent violated Section 8(a)(1) of the Act. *Teksid Aluminum Foundry,* 311 NLRB 711, 716 (1993); *Matheson Fast Freight,* 297 NLRB 63, 69 (1989).

Paragraph 9(c) of the complaint alleges that the Respondent threatened employees with unspecified reprisals because of their union activity. Paragraph 9(e) alleges that the Respondent threatened that it would cut jobs if employees continued to engage in union activity and paragraph 9(j)(2) alleges that the Respondent threatened to move employees to more onerous jobs if they continued their union activity

While Lesslie, Barnes, and Teeter were discussing the union pamphlet, Leslie told Teeter and Barnes that the pamphlet indicated that employees have the right to talk about the Union at work and that they were protected for signing a union card. Barnes replied that he cannot fire an employee for joining the Union, but he could fire employees for scuffing a tire or putting a scratch on the paint. Barnes added that, "he can demote people, he can move people around, he can run one pot carrier, he can change the rate of pay, he can do what he wanted." It is clear that that in the context of this discussion, Barnes' statement that while he could not fire employees for engaging in union activity, he could fire them for minor mistakes is, in fact, an implied threat to discharge employees because of their union activity. Barnes' further statements that he could reduce the number of pot carriers, demote employees, transfer employees, and change the rate of pay can be reasonably construed as implied threats to institute such actions if employees continued to seek union representation. Accordingly, I find that the Respondent additionally violated Section 8(a)(1) of the Act by such statements.

Based on the mutually corroborative testimony of Emerson and Lesslie, I find that Lesslie discussed with Emerson, Adams and the other main union supporters the meeting he had Barnes and Teeter. Thus, the substance of the unfair labor practices directed toward Lesslie was disseminated throughout the work force.

The Conversation Between Teeter and Emerson During the Last Week of October

During the last week of October 2013, Emerson was in Teeter's office when Teeter told him that when employees tried to start a union campaign the last time with Harsco, Nucor was upset. Teeter added that employees who supported the Union would be the first to go in a layoff and he would "make sure that he was one that looked them in the face when he laid them off." (Tr. 202.)Teeter added that the employees that were for the Union would not receive any promotions. Teeter did not specifically deny having such a conversation in his testimony. Based on Emerson's credited and uncontradicted testimony, I find that Teeter's statements that employees who supported the Union would be the first to be laid off and would not receive any promotions violated Section 8(a)(1) of the Act as alleged in paragraph 10(c) the complaint.[15]

The October 21, 2013 Job Posting for Pot Carrier Operators

Paragraph 9(k) of the complaint alleges that about November 2013, the Respondent, by a a written job posting at its facility, "threatened employees currently in the jobs being posted that they were going to lose the job because of their union activities."

It is undisputed that on October 21, 2013, a flyer was posted in the employee breakroom (GC Exh. 37) that states the following:

> Date: 10/21/13-10/28/13
> Job Posting: Pot Carrier
>
> We are currently looking for Pot Carriers if you are interested please talk to Chris Teeter.
>
> We have four positions available at this time.
>
> Thanks.
>
> Rodney

Lesslie observed this posting on approximately October 26 or 27. When Emerson returned from vacation on November 5 or 6 he saw the posting near the timeclock in the locker room, on vending machines, and above the urinals. After seeing the posting, Emerson and Leslie

[15] Paragraph 10(c) alleges that about November 13, 2013, the Respondent, by Teeter, at its facility threatened employees with discharged and threatened employees they would not be promoted because of their union activities. I find that the evidence set forth above regarding Emerson's conversation with Teeter that occurred in the last week of October, 2013 is sufficiently related to the complaint allegation to be considered. *Hi-Tech Cable Corp*., 318 NLRB 280 (1995), enfd. in part, 128 F.3d 271 (5th Cir. 1997).

encountered Mitchell and Emerson asked Mitchell why they were four pot carrier positions available when there was only one pot carrier position vacant. Mitchell responded by saying, "If we did not do as we were told, then there would be four pot carrier positions open." Mitchell did not specifically deny having this conversation with Emerson.[16]

Mitchell's uncontradicted testimony establishes that he started creating the job posting on October 8, 2013. The actual number of openings was not inserted into the posting until Barnes told Mitchell to put in the number "four" in the document on October 21, 2013, and the document was finalized and posted on that date. Mitchell testified he did not know how many pot carrier openings were available between October 21 and 28, he just created the posting as instructed by Barnes. Teeter testified that there were two immediate openings during this period. One was created when Brothers was terminated on October 28 and the other opening was a vacant pot carrier position on B crew that was being covered by other pot carriers working overtime, including Lesslie.

Barnes testified he instructed Mitchell to create the job posting because of a new tonnage dumper project, which was a specialized pot carrier that was being developed to dump molten steel. Barnes testified that the new tonnage dumper was originally scheduled for delivery in March 2014 but that it had been delayed and was not yet delivered in August 2014. Barnes testified that the job posting was posted at the facility in October 2013 because the employees who would operate the tonnage dumper had to be trained by using the existing pot carrier machines. The record establishes that all of the Respondent's existing pot carriers had been promoted from within, except for Lesslie.

On November 8, 2013, Mitchell posted a job for three heavy equipment operators with "Arkansas Workforce" the State of Arkansas' unemployment office. The posting, which requested 15 referrals from the agency, listed Mitchell as the contact person for the Respondent. (R. Exh. 24.)

In assessing whether the job posting unlawfully interfered with the employees' right to engage in union activity, I note that the Respondent, through Rountree, had specific knowledge of the union activity of some of its employees, including pot carriers Emerson, Lesslie, and Brothers by October 18, 2013. It is undisputed that while Mitchell began to prepare a job posting for a carrier position on October 8, he was not instructed by Barnes to put in the number of positions available until October 21, 2013, after the Respondent had learned of the level of support among its pot carriers. Further evidence of the unlawful nature of this posting is derived from Mitchell's statement to Emerson when he was asked why there were four positions posted when there was only one vacancy. As noted above, Mitchell indicated that if employees did not do what they were told "that would be four pot carrier positions open."

In considering the Respondent's defense to this allegation, I find implausible Barnes' explanation that in October 2013, he posted four pot carrier positions because the Respondent needed to begin to train employees to operate a new piece of equipment, a tonnage dumper, which would begin operation at the earliest in March 2014. The posting did not in any way refer

[16] Paragraph 10(b) of the complaint alleges that in November 2013 the Respondent, through Mitchell, threatened employees with discharge because of their union activities.

to a tonnage dumper position. Rather, the posting merely indicated that four positions were available for pot carrier positions, when it is undisputed that only one was vacant. There is also a notable lack of consistency between the testimony of Barnes and Teeter on this point. Teeter's testimony did not include any discussion of the tonnage dumper and how it related to the job posting. Teeter did, however, make reference to the pot carrier position that became available when Brothers was terminated on October 28, but the posting went up on October 21, a week before Brothers' discharge. Clearly then, Brothers' discharge would have no bearing on the number of positions available at the time of the posting. The fact that the Respondent posted a request for three heavy equipment operators with Arkansas Workforce on November 8, does not sufficiently explain why the Respondent posted a notice seeking four pot carriers on October 21, when only one position was vacant.

After considering all the circumstances, including the statements made by Mitchell to Emerson and other employees about the posting in the first week of November, I find that the October 21, 2013 job posting impliedly threatened employees would lose their jobs if they continued to engage in union activities. I also find that Mitchell's statement in the first week of November 2013, also threatened employees with the loss of their jobs if they persisted in their union activities.

The Alleged Violations of Section 8(a)(3), (4), and (1) and Related Independent Alleged Violations of Section 8(a)(1) of the Act

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the Board established a framework for deciding cases turning on employer motivation regarding an adverse employment action taken against an employee. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by a preponderance of the evidence, an employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such a showing are union activity by the employee, employer knowledge of the activity, and antiunion animus on the part of the employer. If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts "to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. Accord: *Mesker Door, Inc*. 357 NLRB No. 59, slip op. at 2 (2011). In the instant case, I will apply the Board's *Wright Line* doctrine in deciding the 8(a)(3), (4), and (1) allegations in the complaint.

An employee's union activity and the Respondent's knowledge of that activity varies from one employee to another and will be set forth in detail herein.[17] It is clear, however, that the Respondent opposes the unionization of its employees. This animus to the union activities of its employees is established by the substantial number of violations of the Act that I find it committed herein.

[17] In Lesslie's case, his involvement with Board processes and the Respondent's knowledge of his involvement will be discussed in detail regarding the complaint allegations that the Respondent discriminated against him in violation of Section 8(a)(4), in addition to Section 8(a)(3).

The Discharge of Jacob Adams

The complaint alleges that the Respondent discharged Adams on October 29, 2013, in violation of Section 8(a)(3) and (1) of the Act.

Facts

Adams worked as a rail crane operator for the Respondent's predecessor Harsco from 2010 until shortly before the Respondent took over the Harsco operation at Hickman. Just prior to the Respondent's takeover of the Harsco operation Adams left to work for another employer, Kinder Morgan, as a scrap crane operator. In August 2013, Adams contacted Ross, his former supervisor at Harsco, and indicated that he would like to work for the Respondent. Adams indicated that he was interested in working for the Respondent as a rail crane operator. After having interviews with Ross and Barnes, Barnes hired Adams as a pit loader, since that was the only position available.[18]

Adams testified that when he was hired, Barnes did not tell him that he had to complete a probationary period. Adams testified that when he received his first check, he spoke to Mike Ross and asked him why he was not getting paid the same amount that the other pit loaders were getting. Ross told him it would be the beginning of 2014 before he received the same pay as the other pit loader operators but Ross did not specifically tell him that he was on a probationary period.[19]

While Barnes did not testify that he told Adams he was a probationary employee when he was originally hired, both Teeter and Ross testified that Adams was told he had to serve a 90-day probationary period at a wage of $1 per hour less than the other pit loaders.

I credit the testimony of Adams over that of Ross and Teeter and find that Adams was not told specifically that he was a probationary employee when he was hired. I found Adams to be a credible witness. His testimony was thorough and detailed and was consistent on both direct and cross-examination. His demeanor reflected a sincere effort to relate the facts as best he could. As noted earlier, I did not find Teeter to generally be a credible witness. In addition, I note that neither Barnes nor Adams testified that Teeter had direct involvement in the hiring of Adams. I also do not find credible the testimony of Ross that he specifically told Adams that he was a probationary employee. In my view, Ross' testimony on this point was designed to support the Respondent's defense and I do not find it to be reliable.

Adams was assigned to the C crew and was given on-the-job training, primarily by Brothers. Justin Meeks also assisted in his training. Adams testified that approximately 2 weeks into his on-the-job training, Ross spoke to him and told him that they were shorthanded on another crew and they needed Brothers to work on that crew. Ross asked Adams if he would take over the pot carrier position on C crew because he had been doing a good job.[20] Adams told Ross

[18] Adams had some prior experience as a pit loader.

[19] Adams was being paid $1 an hour less than the other pit loaders.

[20] Ross admitted telling Adams that he was doing a good job but testified he did so only to encourage him.

that he thought he needed a few more days with Brothers before he was ready to take over the position.

On September 20, pursuant to a spot check of Adams pit loader, Mitchell discovered that there was no fire extinguisher present, Adams did not have a "lockout,"[21] and he was not wearing his fire retardant clothing. Adams was given a written warning (GC Exh. 51) for this violation of the Respondent's safety rules.

In October 2013, Emerson spoke to Adams about organizing a union at the Respondent's operation at Hickman and Adams expressed interest in doing so. On October 21, 2013, Adams attended the first union meeting that employees of the Respondent had with Union Organizer Gonzalez. At this meeting, Gonzalez gave Adams blank union authorization cards and a labor law pamphlet. After attending the union meeting, on several occasions, Adams openly discussed the Union with Emerson and other employees in the employee breakroom which is also used by supervisors. Adams also had a conversation about the Union with another employee in the area where vehicles were fueled. Adams worked October 22, 23 and 24. During this period he had a conversation in the scrap yard with Rountree about the Union. Adams told Rountree that the employees "were going to get the union in." Rountree responded that it would never work and had been tried before.

Adams was off from October 25 until October 29, 2013, when he was scheduled to return to work at 6 p.m. Ross called Adams and asked him to report to the facility at 4 p.m. on October 29 for a meeting. When he arrived, Adams met with Barnes and Teeter in Teeter's office.

When he arrived at the meeting, Teeter told Adams that he was still in his probationary period and it looked like it was not going to work out. When Adams asked what he had done wrong, Barnes told him that he was having "a little bit of trouble out there." When Adams asked what he was having trouble with, Barnes replied "[W]ell there is really no reason because as far as the 90 days, we do not have to have a reason." Barnes then mentioned that he had been a pit loader for a month and he had trouble getting out the "hard knock" and getting it into the slag pit.[22] Barnes indicated that Rountree had brought this to his attention. Barnes added that "It's been kinda one thing right after another." Adams asked if they were letting everyone go that had gone to "that meeting". Teeter asked "What meeting?" Adams responded "That freaking union meeting. I know that is what y'all pissed off about. I was keeping up just fine on that loader." There was no response to Adams' statement.[23]

At the conclusion of the meeting, Barnes gave Adams a personnel action form dated October 29, 2013, and signed by Barnes (GC Exh. 58). With respect to the reason for termination this document indicates only "90 Day Probation." At the trial, the General Counsel introduced a personnel action form regarding Adams (GC Exh. 29) that had been produced by the Respondent

[21] A " lockout" is a safety device used when a pit loader is being repaired.

[22] "Hard knock" is the term " used to refer to the collection of steel and slag that builds up in the bottom of a pot. This material, which may weigh 6000 to 10,000 pounds, must be knocked out of the pot and then picked up and placed into slag pit.

[23] I based my findings regarding this meeting on a transcript of an audio recording that Adams made of the meeting (GC Exh. 59) and Adams' credited testimony which is consistent with the transcription of the meeting.

pursuant to the subpoena issued by the General Counsel. This document also contains Barnes signature and the date of October 29, 2013, but it is more complete and contains Adams' name, address, and his date of hire. This document reflects as the reason for termination "90 day probation period-Not Met standards." The reference to "Not Met Standards" is clearly written in different handwriting. This more complete document was never given to Adams. Barnes testified that with respect to the more complete personnel action form (GC Exh. 29), the only thing he wrote on the document was his signature. He testified that Teeter filled in the other information on the form. Teeter testified that the reference to "90 day probation" in GC Exh. 29 was his handwriting but that he did not write "Not Met Standards" and that he did not know who did. I also note that a third personnel action form regarding Adams was introduced into evidence. (GC Exh. 60.) This document contained the more complete information set forth in GC Exh. 29 but did not contain the reference to "Not Met Standards." The record does not contain any further information about why and when the more complete personnel action forms (GC Exhs. 29 and 60) were prepared and who added the additional information. Adams was never sent a termination letter.

Analysis

Applying the *Wright Line* analysis to the discharge of Adams, after attending the union meeting on October 21, Adams openly advocated for the Union. In this regard, he spoke to other employees about the Union in the breakroom and near the fuel island on October 22, 23, and 24. He also spoke to Rountree during this period and told him that the employees were going to bring a union into the Respondent's Hickman operations.

I find that prior to Adams' discharge on October 29, the Respondent had knowledge of Adams' support for the Union. Adams' name appeared on a list of union supporters that Teeter maintained and that was observed by Lesslie on October 23. In addition, I find that Adams openly indicated his support for the Union during the period of October 22-24 to Rountree[24] and I draw the reasonable inference that Rountree relayed the fact that Adams supported the Union to Teeter and Barnes. A supervisor's knowledge of the union activity of an employee is imputed to higher-level supervisors, absent credible evidence to the contrary. *State Plaza Hotel*, 347 NLRB 755, 756-757 (2006). I do not believe the testimony of Barnes and Teeter that they were not aware of Adams support for the Union prior to his discharge. As I have noted above, I generally do not find them to be credible witnesses and their testimony on this issue is implausible when considered in the context of the record as a whole, especially Leslie's credited testimony that Adams' name was on Teeter's list of known union supporters

The Respondent's animus toward the union activities of its employees is clearly demonstrated by the unfair labor practices that I find it committed during the Union's organizing campaign. In addition, I find that the timing of Adams' discharge, shortly after he engaged in open union activity, supports an inference that his discharge was motivated by his union activity. *State Plaza Hotel*, supra at 755-756; *Toll Mfg. Co*., 341 NLRB 832, 833 (2004). Thus, I find that Adams' discharge was motivated by his union activity, and the burden of persuasion shifts to the

[24] Rountree admitted that Adams spoke to him about a union and that he told Adams the mill was not pleased with the idea of a union. (Tr. 1261)

Respondent to demonstrate the same action would have taken place even in the absence of his protected conduct. *Wright Line*, supra at 1089.

At the trial, Barnes testified that the Respondent's decision to discharge Adams was based on "continuous and recurring" issues during his probationary period. These included his struggle with operating the pit loader and handling the material that he was responsible for, safety issues, and a statement that he was going to perform poorly as a pit loader operator in order to be transferred to the rail crane. (Tr. 25, 978.) Barnes also testified that Klee, Teeter, and Ross were involved in the decision to terminate Adams. (Tr. 1132.) Barnes testified that the decision was made a week before Adams was terminated. Barnes prepared a signed note on October 25 regarding Adams indicating that he had a meeting with Teeter and a decision was made to terminate Adams when he returned. (R. Exh. 30D.) This note reflected that on October 21, Adams had trouble "digging steel" and asked his lead man to help him. It also noted that on October 23 he asked his lead man to help him with the "hard knock." The note also indicated that Ross had reported Adams "wasn't keeping the cranes fed." Finally the note reflects that he had been "written up for safety as well."

As noted above, however, when Barnes and Teeter met with Adams on October 29, to inform him he was discharged, Barnes told him generally that he was having trouble in his probationary period and it was not going to work out. The only specific problem that Barnes raised was trouble getting the "hard knock" out of the pot and getting it into the slag pit. The only document given to Adams was a personnel action form signed by Barnes indicating the reason for termination was "90 Day Probation." (GC Exh. 58.) As I noted above, there is no record explanation as to why the more complete personnel action forms regarding Adams (GC Exhs. 29 and 60) furnished to the General Counsel pursuant to subpoena were prepared and who prepared them.

Adams acknowledged on one occasion approximately a month before he was discharged, that he had mentioned over the radio that he was having trouble getting a big piece of steel out of the "hard knock," but that he did not have to have any assistance in resolving the problem. (Tr. 708-709.) Adams also acknowledged that on one occasion he asked Rountree to help him dig out steel that had been dumped in the wrong place. According to Adams, there was too much for one loader to handle so he asked Rountree to help him. (Tr. 722-727.) Adams indicated it was not unusual for employees to help each other when necessary and that leadmen also did so.

Barnes, Teeter, Ross and Rountree testified that that Adams had to request assistance from Rountree on numerous occasions in order to have assistance in performing the job duties associated with a pit loader throughout the time he was employed in that position.

I credit the testimony of Adams over the testimony of the Respondent's witnesses regarding his ability to perform as a pit loader. Adams' testimony was straightforward and concise and his demeanor reflected certainty regarding these issues. I do not credit the testimony of the Respondent's witnesses, as their testimony was vague and generalized. I also find it to be implausible that no written warnings were given to Adams for any alleged deficiencies. If Adams performed as poorly as the Respondent's witnesses testified he did, it would appear that warnings would have been issued for such poor performance. I also note that Barnes' written

notation of his alleged problems was prepared on October 25, after the Respondent knew that Adams was engaged in union activity.

Adams also denied that he ever had to ask Rountree to help him "feed" the cranes. Adams' denial is uncontradicted as Rountree did not testify regarding this issue. Ross testified that Adams had trouble keeping up with feeding the cranes and that Ross had to bring in employees to help because he was getting behind. Ross was unable to recall any details of these occurrences. I do not credit Ross' testimony on this point as it is vague and generalized.

Adams denied telling others that he was going to do a poor job as a pit loader in order to be reassigned as a rail crane operator. Rountree testified that Adams had made such statements to him and he had relayed those statements to Ross, but did not tell anyone else. Payne testified that he heard Adams say over the radio to Rountree that he was going to do as little as possible in the pit loader position so he could get moved to something else. Payne indicated that he told Ross and Barnes about overhearing this conversation. I credit Adams' denial that he did not make such a statement over the testimony of Rountree and Payne. It appears to me to be implausible that an employee would tell his supervisor over a radio that he would intentionally do a poor job in the hope that poor performance would get him transferred to a better job. Adams did not strike me as someone who would publicly make such an illogical statement.

As with Adams' other alleged shortcomings as a pit loader operator, there is no documentation of a warning being given to Adams regarding an inability to "feed" the cranes or that he was intentionally not attempting to perform his duties properly. In addition, there are no documents memorializing that any supervisor even spoke to Adams about any of his alleged shortcomings prior to his termination. Thus, Adams was never given an opportunity to respond to any allegations of poor performance prior to being discharged. The Board has found that the failure to conduct a meaningful investigation and to give an employee an opportunity to explain his or her actions to be a significant factor in finding discriminatory motivation. *Publishers Printing Co.,* 317 NLRB 933, 938 (1995) enfd. 106 F.3d 41 (6th Cir. 1996); *K & M Electronics,* 283 NLRB 279, 291 fn. 45.(1987).

As I have noted above, on October 18, Brothers was promoted to work as a pot carrier operator on D crew and Adams was given the position as a regular pit loader on C crew. I doubt that the Respondent would have given this position to Adams if he were as poor of an employee as the Respondent now contends.

In support of its defense, the Respondent also relies on the fact that it discharged two other employees during their probationary period. Alex Capps was hired as a welder on January 14, 2014 (R. Exh. 30E). According to Barnes' uncontradicted testimony, although Capps claimed during his interview that he was an experienced welder and fabricator, he could not fabricate metal properly. After a couple of weeks, Barnes, Maintenance Manager Mike Shackells, and Teeter made the decision to terminate Capps. On February 5, 2014, Capps was given a letter informing him of his termination (R. Exh. 30C).[25] This letter states, in pertinent part: "During your interview you let us to believe that you were an experienced welder and fabricator. Unfortunately, you have not shown proficiency in these areas (welding & fabrication) which is a

[25] This letter is incorrectly dated February 3, 2013.

job requirement; therefore, you are not meeting the minimum standards to continue your employment with Phoenix Services LLC."

Eric Dent, who had been working for Harsco, was hired by the Respondent as a pit loader operator on May 30, 2013, when it took over the Harsco operation. On June 12, 2013, Dent was given a written warning for "entering (sic) the slag out underneath the # 2 furnace to clean up without first contacting the Nucor furnace operator which put him in harm's way." On June 12, Dent was given another warning for running out of fuel and failing to complete a preshift inspection on his loader. This warning specifically indicated "This is your last warning." On June 14, 2013, Dent had an accident which bent a handrail and steps on his loader and caused $620 in damage. Dent did not report the accident. The incident reporting form dated June 19, 2013, indicates "The machine operator knew he was going to lose his job so he did not tell me what and how he did the damage." The incident report form indicates that Dent was terminated on June 19, 2013, for failing to report the accident. (GC Exh. 53.)

In assessing the Respondent's defense, I note that the Board has held that under *Wright Line,* "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place in the absence of the protected activity." *W. F. Bolin, Co*., 311 NLRB 1118, 1119 (1993), enfd. 99 F.3d 1139 (6th Cir. 1996). In order to meet the *Wright Line* burden of persuasion, an employer must establish that it has consistently and evenly applied its disciplinary rules. *DHL Express, Inc*., 360 NLRB No. 87, JD slip op. at 7 (2014). I find that the discharges of Capps and Dent are insufficient to establish a valid *Wright Line* defense in this case.

With respect to Dent, he was given two written warnings prior to his discharge and a second warning clearly indicated that it was a final warning. 2 days' later, Dent damaged his pit loader and failed to report it and was then terminated. The circumstances surrounding Dent's termination are far different from those involving Adams. Adams was issued only one written warning for not having the proper safety equipment and the Respondent did not rely on that warning in deciding to discharge Adams. Rather, the Respondent relied on Adams' alleged problems in fulfilling his duties properly. With regard to the vague claims regarding Adams' job performance made by Barnes at Adams' termination interview, there is no evidence that Adams was issued a written warning for the alleged conduct.

While the Respondent did discharge Capps shortly after he began working for the Respondent for an inability to perform the requirements of his position, I find that this one discharge is insufficient to establish that the Respondent consistently and evenly applied a policy of terminating newly hired employees for poor job performance such that it would establish a valid *Wright Line* defense. As noted above, I have not credited most of the testimony regarding the alleged shortcomings of Adams as a pit loader operator. Thus, the Respondent has not met its burden of establishing that the circumstances surrounding Adams' discharge are the equivalent to those involving Capps. I also note that Adams was never given a letter from the Respondent regarding his termination. The only document he was given was a personnel action form reflecting that he was terminated during a "90 Day Probation" without indicating any further reason for the termination. While the Respondent later produced a personnel action form indicating that Adams had "Not Met Standards," it did not produce evidence indicating why and when this information was added to the personnel action form. The circumstances suggest that it

was done in order to buttress the Respondent's defense regarding Adams' discharge. Clearly, the Respondent's failure to give Adams a letter clearly delineating the reasons for his discharge deviates from the practice utilized by the Respondent in discharging Capps. The Board has held that a deviation from past practice when administering discipline supports an inference of unlawful motivation. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003).

After considering all of the evidence regarding the discharge of Adams, I conclude that the Respondent has not met its burden under *Wright Line* to establish that it would have discharged Adams even if he had not engaged in union activity. Rather, I find that the evidence as a whole allows me to draw the reasonable inference that shortly after learning that Adams was union supporter, Barnes spoke to the other supervisors to find reasons to discharge Adams. Barnes prepared his October 25 memo setting forth the alleged shortcomings of Adams as a pit loader operator and relied on those vague assertions in an attempt to mask the discriminatory motivation behind the discharge. Accordingly, I find that Adams' discharge violates Section 8(a)(3) and (1) of the Act.

Chris Brothers

The complaint alleges that Respondent discharged Brothers on October 28, 2013, in violation of Section 8(a)(3) and (1) of the Act.

Facts

Brothers began working for the Respondent as a pit loader operator on June 1, 2013. Prior to the Respondent taking over the operation at the Nucor Hickman facility, Brothers had worked for Harsco as both a pit loader and a pot carrier. Brothers worked on the C crew with Lesslie and Emerson and was involved in training Adams as a pit loader in September and October 2013. On October 18, 2013, Brothers was promoted to work as a pot carrier operator on the D crew. As noted earlier, prior to the start of his shift on October 18 at 6 p.m., Brothers, Lesslie and Emerson were in the scrap office preparing paperwork for the beginning of their shift and discussing the Union when Rountree walked into the office. The employees continued their discussion in the presence of Rountree and then asked him what he thought about a union. Rountree responded by saying that he did not want to hear about it and that he did not want to hear them talking about the Union over the radio and to get out of his office.

When Brothers first arrived at the number 2 furnace on the evening of October 18, he noticed that a spillover had occurred and red hot slag was still on the ground around the furnace. Brothers notified his leadman, David Thompson, of this incident. The Respondent assigned one of its pit loader operators to remove the molten slag from this spillover and create a flat surface to enable the pot to sit correctly underneath the furnace. Because of the length of time it took the pit loader operator to perform this task, Nucor shut the furnace down for a period of several minutes. It is undisputed that Brothers did not have any role in the spill that caused the furnace to shut down on that occasion. Brothers had just reported to work when he observed it and reported it to his leadman. It was the pit loader's responsibility to remove the molten slag from the area where the pot sits and Brothers had no role in that process.

At approximately 7p.m. on October 18, Thompson told Brothers to check his radio and make sure that he was on the right channel and the battery was not dead because Nucor furnace

operator Jason Hicks was trying to reach him. Brothers checked his radio and the battery was dead and he informed Thompson of this fact. Thompson then gave Brothers a new battery. On this shift Brothers had only one radio in his pit loader.

At approximately 11:30 p.m. on the night of October 18, 2013, Thompson heard Hicks call Brothers on the radio and inform him that he could remove the pot. There was no response from Brothers, who testified that he had dozed off while waiting for the call to get the pot. Thompson radioed Jason Middleton, who operated a charge hauler for the Respondent, to check on Brothers. Middleton did as instructed and then radioed Thompson that Brothers' pit loader was moving. Brothers changed out the pot and, after he had retrieved it, Hicks came on the radio and asked Brothers if he had "swapped out" the pot. Brothers confirmed that he had swapped out the pot but Hicks informed Brothers that he was shutting the furnace down. The furnace was restarted when Brothers placed the pot underneath the furnace.[26]

Thompson testified that after this incident, he went over and spoke to Brothers and asked him, "What was going on?" Thompson added that the furnace had been shut off and they were "messing up." Brothers said that his radio had been dead and he had not heard the call but denied falling asleep. Thompson instructed Brothers to pay attention as to what is going on. Thompson also testified that before the end of the shift at 6 a.m. on October 19, he spoke to Nucor Head Furnace Melter Garrick Wilson about the furnace shutdown. While Wilson testified at the trial, he did not testify regarding such a conversation. Accordingly, Thompson's testimony about what Wilson said to him in this conversation is hearsay and of limited probative value. According to Thompson's uncontradicted testimony, however, Thompson spoke to Brothers at the end of the shift on the morning of October 19 and told him that it is was dangerous to not be in contact and that Wilson was afraid that he had fallen asleep. Thompson also told Brothers that he had one more chance to keep working.[27] According to Thompson, at that time Brothers did not admit that he had fallen asleep while on duty.[28]

Thompson also reported both of the incidents that occurred on the October 18- 19 shift that caused the Nucor furnace to shut down to Teeter and Barnes. On October 19 at 11:50 a.m Teeter sent an email to Nucor Supervisors Bob Cope and Joe Hicks. The email initially reported the spillover incident that Brothers reported to Thompson and for which Brothers was not at fault. The email then stated:

[26] Thompson credibly explained that the furnace was shut down because there was no slag pot under the furnace. According to Thompson, Nucor could not take the chance of continuing to run the furnace and have the pot carrier try to put a pot under it because the furnace may start "slagging" and put the pot carrier in a dangerous position. According to Barnes' uncontradicted and credited testimony, there is also an economic aspect to shutting down the furnace. If a furnace is running at full production and is shutdown, the cost to Nucor is $13 a second. However, that cost is not passed on to the Respondent.

[27] There is a material error in the transcript regarding this portion of Thompson's testimony. The transcript indicates that Thompson told Brothers "he had no more chance to go on and keep working." (Tr. 1315.) My recollection of the testimony, which is corroborated by my contemporaneous notes, reflects that Thompson said the word "one" rather than the word "no". Accordingly, I order the transcript to be corrected so that the word "one" be inserted in the place of the word " no" on Tr. 1315, l. 14.

[28] Brothers did not testify regarding these conversations with Thompson.

> Later in the night despite calling on 3 different channels the furnace could not reach Chris Brothers to swap the pot out, charge carrier operator Jason Middleton went around to get him moving, Chris swapped the pot out but then failed to inform Jason Hicks that it had been changed out which resulted in Jason waiting on Chris for sometime. (sic)
>
> We will be looking into these occurrences thoroughly and will provide you with a full report and corrective/preventative actions ASAP, we apologize for the delays and inconvenience.

Wilson testified for the Respondent pursuant to a subpoena. According to Wilson, on the October 19- 20 shift there were two more instances of Brothers not promptly responding to radio calls from Hicks, the Nucor furnace operator. On the first occasion, Wilson heard Hicks call Brothers more than five times before Brothers responded and swapped out the pot. After this occurrence, Wilson mentioned to Thompson that there had been a delay with the pot carrier on two occasions and that Thompson may want to follow up on this. Thompson told Wilson that he would take care of it.

Later in the shift, Hicks again called Brothers and did not receive a timely response. On this occasion, Hicks made a decision to shut down the furnace for safety reasons. Wilson went to the number 2 furnace and could see the pot hauler parked in place and prepared to get the slag pot. Wilson could see Brothers in the cab of the pit loader but he was sitting still and not moving. Brothers ultimately responded to Hicks' call and removed the pot from the furnace area. After this incident, Wilson called Thompson on the radio and informed him that Nucor had to shut the furnace down again and this occurred after the two previous instances of delay. Wilson said that this was getting repetitive and it needed to be taken care of. Thompson responded that he would take care of it and make sure it did not happen again. On the morning of October 20, Wilson reported what had happened with Brothers on the previous shift to Hicks and Cope. Wilson informed them and that he had reported the incidents to Thompson and had been assured that the Respondent was "taking care of it." Wilson testified that it is very rare for the furnace to be shut down because of problems with a pot carrier operator. Wilson indicated such an incident occurs approximately every 3 years.[29]

I credit Wilson's testimony regarding his conversations with Thompson during the shift of October 19- 20 to the extent it conflicts with that of Thompson. Wilson is a disinterested witness with no stake in the proceeding. His testimony was detailed and straightforward and his demeanor reflected sincerity. Thompson's testimony, on the other hand, is not as reliable as it refers to Wilson making statements that Wilson does not say he made. Brothers did not testify regarding the two instances of delay and the shutdown of the furnace that occurred during his shift from 6 p.m. on October 19 to 6 a.m. on October 20.

I credit Thompson's testimony that he reported to Teeter on the morning of October 20 that Nucor had caught Brothers sleeping again and could not raise him on the radio.

[29] Thompson testified that it was rare for furnace to be shut down for anything other than regular maintenance. He testified a shut down for any safety related reason during production would occur approximately every 3 to 6 months.

Barnes testified that on Monday, October 21, 2013, Nucor Supervisor Bob Cope came to his office and said that he was disappointed in the fact that the furnace had to be shutdown two nights in a row because a pot had not been removed. According to Barnes, Cope said that he would not be one to tell Barnes how to run his business but that Nucor could not have this happen three times and could not have it happen again. According to Barnes, Cope added that Nucor employees were fired for sleeping three times and that Nucor could not have Brothers back at the furnace. According to Barnes, Teeter was present in his office during this conversation with Cope. Importantly, Cope did not testify at the trial. Since Cope did not testify at the trial, Barnes' testimony regarding what Cope stated at this meeting is obviously hearsay. In addition, Teeter's testimony was very vague. When asked how he found out what happened during the October 19-October 20 night shift, Teeter testified that he had found out from Cope. However, Teeter testified in a very general manager that "they" said that a delay had occurred two nights in a row and that they could not have Brothers back at the furnace "running production."

I find that Barnes' hearsay testimony regarding what Cope stated during their meeting is too unreliable to base a finding that Nucor explicitly expressed a position with regard to Brothers' continued employment with the Respondent. I also find that Teeter's hearsay testimony regarding what Cope expressed to him about Brothers does not have sufficient reliability to conclude that Nucor expressly requested that Brothers be terminated by the Respondent.

As noted earlier in this decision, on October 22, 2013, Brothers attended the union meeting with Gonzalez and signed an authorization card, which he returned to Gonzalez. On October 23, Lesslie observed that Brother's name was on the list of union supporters that Teeter had with him when he met with Lesslie at the Good Earth parking lot.

At some time that is not precisely defined in the record, Barnes reported to Klee that high-level Nucor supervisors were upset because Brothers had been sleeping on the job and had caused a shutdown of the furnace. Klee recommended to Barnes that Brothers be given a 5-day suspension pending termination so that the Respondent could make sure that it had all the facts straight.

On Thursday, October 24, 2013, Brothers worked the 6 a.m. to 6p.m. shift on C crew for Lesslie, who was on vacation. On Friday, October 25, Brothers was again working the 6:00 a.m. to 6:00 p.m. shift on C crew. Brothers was instructed to report to a meeting in Teeter's office at approximately noon on October 25. When Brothers arrived at the meeting, Teeter, Barnes and Ross, were present.

At the meeting, Teeters told Brothers that they had decided to suspend him for shutting down the furnace and gave him a suspension notice dated October 25, 2013. (GC Exh. 26.) The suspension notice reflects that Brothers was suspended for 5 days for "Sleeping on the job/holding the furnace up 3 times in 2 nights." The notice indicated that the suspension was to begin on October 25 and end on November 2 and that Brothers should return to work on November 3 "unless further notified." Brothers asked why he was being suspended when so much time had gone by. Teeter responded the suspension was for not communicating on the radio, for sleeping, and for shutting the furnace down. I credit the mutually corroborative

testimony of Teeter and Barnes that Brothers admitted that he had fallen asleep twice and repeatedly apologized for it. Brothers did not deny making such a statement in his testimony and it is consistent with the record as a whole. Brothers was then escorted to the employee parking lot by Leadman David Perry.

Thereafter, Brothers received a letter dated October 28, 2013, signed by Barnes reflecting that he was terminated as of that date for "poor performance and not following proper safety protocol."(GC Exh. 28.) After receiving the letter, Brothers went to the facility and met briefly with Barnes and administrative assistant Lisa Dawood. At this meeting Brothers was given a personnel action form signed by Teeter and dated October 29, 2013. (GC Exh. 27.) The personnel action form indicates that the reason for Brothers' termination was "Safety Protocol."

Teeter testified that after Brothers' suspension, he and Barnes discussed the situation with Klee and Tony Cunningham and a decision was made to terminate Brothers. Teeter testified that the reason for Brother's termination was that he fell asleep and delayed the furnace and it caused an unsafe situation. While Barnes testified that Klee and he made the decision to discharge Brothers, Klee testified that it was ultimately the decision of Barnes. (Tr. 1364) Klee admitted that prior to the decision to terminate Brothers, Barnes had informed her that there was union organizing activity at the facility, but she denied knowing that Brothers was a union supporter prior to the decision to discharge him.

Analysis

Applying the *Wright Line* factors to Brothers' discharge, I find that Brothers was an open union supporter. In this regard Brothers, Emerson, and Lesslie openly discussed their support for the Union on October 18 in the presence of Rountree, an acknowledged supervisor. In addition, on October 22, 2013, Brothers attended the union meeting with Gonzalez and signed a union authorization card. I also find that Brothers' union activity was known by the Respondent. As noted above, on October 18, Brothers, Lesslie, and Emerson openly discussed their support for the Union in the presence of Rountree. I impute the knowledge of Rountree to Barnes and Teeter. *State Plaza Hotel*, 347 NLRB 755 (2006). In addition, I find that on October 23, Barnes and Teeter had a list of known union supporters that included Brothers. Finally, Klee admitted that Barnes had informed her of the union organizing efforts prior to the discharge of Brothers, although she denied knowing that Brothers was a union supporter at the time of his discharge. I do not believe that Barnes would relay to Klee that there was a union organizing effort without also telling her who the primary union supporters were. Based on the record as a whole, and particularly the facts set forth above, I do not believe the testimony of Teeter, Barnes, and Klee that they were not aware of Brothers' support for the Union at the time of his discharge. Accordingly, I find that the Respondent knew of Brothers' support for the Union at the time of his suspension and discharge.

The Respondent's animus regarding the union activities of its employees is clearly established by virtue of the multiple unfair labor practices that I find it committed in this proceeding. I also find that the timing of Brothers' discharge shortly after the Respondent learned of his union activity supports a conclusion that the Respondent's motive in discharging Brothers was his union activity. *DHL Express*, 360 NLRB No. 87, JD slip op. at 7 (2014); *Toll Mfg. Co*., 341 NLRB 832, 833 (2004). Accordingly, I find that the General Counsel has

established a prima facie case under *Wright Line* that Brothers' discharge was discriminatorily motivated and the burden shifts to the Respondent to establish that it would have taken the same action against Brothers in the absence of his union activities.

The Respondent contends that it discharged Brothers because he fell asleep two nights in a row, causing a furnace to shut down and interrupting the production of steel. The Respondent also contends that Brothers' conduct created a potentially dangerous situation.

As noted above, I find on both the first and second nights Brothers worked as a pot carrier operator, he fell asleep and therefore delayed his removal of the pot underneath furnace 2. Shortly after Brothers fell asleep and caused the furnace to shut down during the shift from 6 p.m. October 18 to 6 a.m. on October19, Thompson spoke to Brothers and told him he was "messing up," and to pay attention to what was going on. After speaking with Wilson, Thompson again spoke to Brothers at the end of the shift and told him that Wilson thought he had fallen asleep and that it was dangerous not to be in radio contact. Thompson warned Brothers that he had one more chance to keep working.

After Thompson reported the incident involving Brothers to Teeter on the morning of October 19, Teeter sent an email to Nucor Supervisors Cope and Hicks acknowledging that Brothers' failure to respond to calls had cause a delay in the removal of a pot. Teeter indicated that the Respondent would investigate the matter and provide a full report and corrective action and apologized for the delay. Thus, it is clear that the Respondent took this matter seriously and indicated to Nucor that it would take corrective action.

During the shift from 6 p.m. on October 19 to 6 a.m. on October 20, there were two more instances of Brothers not promptly responding to radio calls from the Nucor furnace operator. On the first occasion, Wilson heard Hicks, the furnace operator, call Brothers more than five times before Brothers responded and swapped out the pot. After this occurrence, Wilson spoke to Thompson and indicated that there had now been a delay with Brothers on two occasions and that Thompson may want to follow up on this. Thompson assured Wilson that he would take care of it.

Later in the shift, the furnace operator again called Brothers to retrieve the pot but did not receive a timely response. On this occasion, the furnace operator shut the furnace down for safety reasons. On this occasion Wilson personally observed Brothers in the cab of the pot carrier sitting still and not moving. After this incident, Wilson contacted Thompson and told him that the situation was getting repetitive and it needed to be taken care of. Thompson responded by telling Wilson it would be taken care of and he would make sure it did not happen again.

I find that Wilson's credited testimony that the situation with Brothers was getting repetitive and needed to be taken care of clearly indicates Nucor's dissatisfaction with the way that Brothers was performing his duties as a pot carrier operator. It is rare that a furnace is shut down for any reason other than regularly scheduled maintenance. According to Wilson's credited testimony, it is exceedingly rare for a furnace to be shut down because of a lack of responsiveness by a pot carrier operator. Wilson indicated such a situation occurs approximately every 3 years. However, Brothers' conduct in falling asleep caused Nucor to shut down its furnace because of his unresponsiveness 2 nights in a row. As noted above, there is an economic

impact on Nucor when a furnace is shut down while operating at full production. On another occasion, Brothers' unresponsiveness caused a delay in his returning to the furnace but the furnace was not shut down. The record indicates that there are safety considerations involved when a pot carrier operator fails to timely remove the pot from underneath the furnace. A "boilover" may occur which involved the spilling of molten steel and slag from the pot into the area around the furnace.

The record establishes that a pot carrier is a potentially dangerous piece of equipment. The removal and placement of the pot is also an important part of the steelmaking process The Respondent is entitled to expect a pot carrier operator to be awake and responsive to the furnace operator in carrying out the important collaboration between the two. In the instant case, Brothers failed on two consecutive nights to properly fulfill his important duties. After the incident on the first night, Thompson warned Brothers that he had one more chance. Despite that warning, Brothers was unable to properly fulfill his duties on the next shift. I find that, under the circumstances, the Respondent was entitled to discharge Brothers for his failure to remain awake and be responsive at a time when he was responsible for the operation of an important and potentially dangerous piece of equipment. *Brooklyn Hospital*, 302 NLRB 785, 789 (1991). While Brothers was a known supporter of the Union at the time the Respondent decided to suspend and then discharge him, it is well established that his status as a union supporter does not shield him from legitimate employment decisions. *Framan Mechanical Inc*., 343 NLRB 408 (2004).

Brothers was not the first employee that the Respondent had discharged for failing to properly operate equipment since it began operations in June 2013. As discussed above, the Respondent discharged Eric Dent in June 2013, after he failed to properly operate his pit loader on three occasions and failed to report property damage regarding the last incident.

While the General Counsel contends that there is evidence of disparate treatment in this case that supports a finding of a discriminatory discharge, I find the instances relied on by the General Counsel are distinguishable. In this regard the General Counsel claims that the Respondent has not discharged other employees who have caused a furnace shutdown. In support of this argument, the General Counsel relies on the testimony of Brothers regarding three situations he was familiar with. Brothers testified in approximately August 2013 he was working as a pit loader and observed furnace 1 "boil over." Brothers was not aware of the reason that the furnace boiled over but testified it was "probably" the chemical composition of the steel being made in the furnace. Brothers testified that pot carrier operator Rob Koontz called him on the radio and asked him to help him dig out the area where the boilover had occurred in order to make it safe. According to Brothers, pot carrier operator Koontz had made the decision to shut down the furnace in order to clean up the area.

Brothers also testified that he was aware of the shutdown that occurred between June and October 2013, involving Lesslie. Brothers testified that Leslie called him on the radio to ask him to help clean up the area around the furnace because "Rob" had a boilover. On this occasion, Brothers heard over the radio the Nucor furnace operator indicate that he was shutting down the furnace in order to have the area cleaned up. Brothers also testified that during the time he was employed by the Respondent as a pit loader operator, on two occasions he assisted Emerson with the cleanup after a boilover. On both occasions, Brothers testified the furnace operator made the

decision to shut down the furnace in order to allow the area around the furnace to be safely cleaned up.

The record establishes that occasionally boilovers occur during the steelmaking process. There is no evidence that an error by the pot carrier operator was responsible for the shutdown of the furnace on any of these occurrences. Thus, I find that none of these incidents supports a claim of disparate treatment.

On August 7, 2014, a Nucor furnace operator called on the radio three times for William Fender, a "charge hauler" employed by the Respondent, to drop a load of scrap metal into the furnace. When there was no response to the call, the furnace operator shut down the furnace for approximately 9 minutes until the scrap metal was dropped into the furnace. On that date, Fender was training a new charge hauler. Fender was responsible for delivering scrap metal to furnace 2 and the trainee was responsible for furnace 1. Fender took his charge hauler to the shop to repair the air-conditioner and it was during this period that the delay occurred on furnace 2, causing it to be shutdown. On August 7, 2014, Fender was giving a written verbal warning. The warning (GC Exh. 61) states in relevant part, "Leaving the trainee in charge of hauling buckets, resulting in buckets not being in proper place & furnace having to shut down. This type of behavior will not be tolerated."

As explained in detail above, Brothers caused the shutdown of a furnace on 2 consecutive nights because he was nonresponsive to the calls of the furnace operator as a result of sleeping on the job. After the shutdown of the furnace on the first night, Brothers was verbally warned by his supervisor, Thompson, that he had one more chance. Fender was given a written verbal warning for causing the shutdown of the furnace. The warning specifically indicated, "This type of behavior will not be tolerated." Fender caused only one shutdown, not two. He was given a written verbal warning for his first occurrence and informed that this type of behavior would not be tolerated in the future. Since Fender did not cause two furnace shut downs to occur I find that this evidence does not support a claim of disparate treatment.

The General Counsel also claims that the fact that employee Michael Jackson was suspended and reassigned, but not discharged, also establishes a discriminatory motive with regard to the discharge of Brothers. Jackson operated a rail crane which was involved in the process of feeding scrap metal to the furnace. Jackson left the crane he was operating after the end of his scheduled shift but before his relief operator arrived. Jackson was suspended for this incident and reassigned from the rail crane to a position as a pit loader. There is no evidence, however, that Jackson's action in leaving the rail crane unattended for a period of time resulted in a shutdown of a furnace. Thus, I find the situation to be distinguishable from those involving Brothers.

The General Counsel also relies on evidence that employees and supervisors have been caught sleeping on the job without disciplined being imposed as supportive of his claim that Brothers was treated disparately. In this connection, Brothers testified that since the Respondent began operations in June 2013, he observed the following employees who had fallen asleep while working: pit loader operator Dennis Chitester; Razer; Payne; pit loader operator Wesley Meeks; Emerson and Lesslie. Brothers testified that he observed Thompson wake Chitester approximately six different times. Brothers testified that he observed Rountree wake up Lesslie

and Payne. According to Brothers, he observed Rountree wake up Meeks approximately 24 times. In addition, Brothers observed Leadman James Knuth wake up pot carrier Robert Koontz. Brothers' testimony on this issue is uncontradicted and I credit it.

According to the credited testimony of Brothers, Michael Jackson, Lesslie, and Emerson, the following leadmen had been observed asleep at work, Rountree, Thompson, Knuth, and Ashley. There is no evidence, however, that anyone in supervision above the leadman level was aware that leadmen had fallen asleep at work.

While there is evidence that employees and leadmen have fallen asleep on the job, there is no evidence that by virtue of doing so any of the above-named individuals had caused the shutdown of a furnace or any other interruption in production. Thus, I do not find that this evidence supports a finding that Brothers was treated disparately from other employees and that his discharge was discriminatorily motivated.

On the basis of the foregoing, I find that the Respondent has established a valid *Wright Line* defense to the allegation that it discriminatorily discharged Brothers in violation of Section 8(a)(3) and (1) of the Act. Accordingly, I shall dismiss this allegation in the complaint.

Michael Emerson

The complaint alleges that the Respondent took the following actions against Emerson in violation of Section 8(a)(3) and (1) of the Act: suspended him on November 25, 2013 (paragraph 14 (c)); suspended him on February 12, 2014 (paragraphs 7, 8, and 14(h)); and disciplined him on March 6 and April 23, 2014 (paragraphs 14(j) and (k)).

Emerson's Continued Union Activity

As noted above, on October 21 and 22 Emerson attended a meeting with Union Organizer Gonzalez and other employees. Emerson was given blank authorization cards in order for him to solicit other employees to join the Union. Emerson continued to speak about the Union at work and obtained approximately six signed authorization cards from other employees. Emerson was open about his support for the Union. In this connection, leadman Knuth admitted that starting in July 2013 and continuing into August 2014, Emerson told Knuth on many occasions that employees were going to get the Union into the facility and everything was going to be better.

On October 24, Lesslie informed Emerson that Barnes and Teeter had a list of employees who attended the union meeting and the list included Emerson, Adams, and Brothers. Lesslie also told Emerson that Barnes and Teeter had accused Leslie of being the ringleader of the Union. Shortly after his conversation with Lesslie, Emerson set a text message to his supervisor, Rountree, and informed him that if Barnes and Teeter wanted to blame someone for the Union, they could blame him.[30]

[30] Rountree admitted receiving such a text message from Emerson.

The Independent 8(a)(1) Violation Directed to Emerson

Emerson testified that he had notified the Respondent in mid-December 2013 that he could not work the night of December 31, 2013. Although Emerson was not on the schedule for that night, on December 29 or 30, Knuth informed Emerson that he had to work on the evening of December 31, 2013. Emerson responded by saying that he had given the Respondent 2 weeks' notice that he could not work that evening and that he was not going to work. Later that afternoon, Teeter called Emerson to his office. Teeter asked why he could not work on December 31. Emerson replied that he had given the Respondent 2 weeks' notice and that he was not able to work that night. Emerson did not work the night of December 31 but did not receive any discipline for his failure to do so.

The Respondent maintains a signup sheet for employees to volunteer to work overtime. Teeter testified that Brandon Lesslie had volunteered to work overtime on the night of December 31, but then called in and said he would not work that night. Teeter recalled Lesslie saying he was sick. Teeter testified that after the Respondent received this information from Lesslie, Knuth asked Emerson to cover the pot carrier position. When Knuth reported that Emerson said he would not come into work on New Year's Eve, Teeter met with Emerson. When Emerson said that he was scheduled to be off and could not cover New Year's Eve, Teeter replied that he and Lesslie were the only two people who could cover it at that point. Teeter added that since Lesslie had backed out, Emerson was left with the responsibility to cover the position. Teeter added that if Emerson was required to work and did not show up, it could result in disciplinary action. Teeter testified that Emerson did not work that might but that he was not sure who did.

As Teeter acknowledged, another pot carrier operator covered the December 31, 2013 night shift. However, there is no evidence establishing who that employee was and how he came to be assigned to work that night. There is no dispute regarding the fact that Emerson had requested to be off on New Year's Eve and was not on the schedule to work that night. The Respondent did not produce any objective evidence to establish that after being informed by Lesslie that he could not work on New Year's Eve, even though he had volunteered for it, it was necessary to attempt to assign the work to Emerson. Under these circumstances, I conclude that the Respondent, through Teeter, threatened to discipline Emerson for not working on a scheduled day off in retaliation for his union activity. By doing so, the Respondent coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act as alleged in paragraph 11(c) of the complaint.

Emerson's November 25, 2013 Warning

In November 2013, Emerson was prescribed medication to help him sleep that caused him some difficulty in waking up. On Friday, November 22, 2013, Emerson failed to wake up in time to report for work at the start of his shift and did not arrive at work until 2 hours after the start of the shift. On Saturday, November 23, Emerson again had difficulty waking up and reported to work approximately 2 hours after the start of his scheduled shift.

Teeter testified that he was aware that Emerson was on medication and spoke to Emerson about it on Saturday, November 23. According to Teeter, Emerson stated that he had taken the sleep medication and it caused him difficulty in waking up. Teeter also testified that Emerson

said he was fine to operate his machine. Teeter further testified, "He did appear to have all his faculties about him, and I agreed with him." (Tr. 985.) Teeter told Emerson, however, that he wanted Emerson to take Sunday off. Teeter testified he did so in order to make sure that Emerson was rested and ready to perform his duties the following Monday. Emerson worked the remainder of his shift on Saturday, November 23, without incident.

On Monday, November 25, 2013, Teeter issued Emerson a written warning dated November 25, 2013 for "reporting late for work." (GC Exh. 8A.) Teeter also gave Emerson a 1-day suspension notice dated November 25, 2013. (GC Exh. 8.) The suspension notice indicated that Emerson was suspended for 1 day for "Reporting late for work 2 consecutive days, this behavior is unacceptable." It further indicated that the suspension will begin on November 24 and end on November 25.

It is undisputed that in November, 2013, the Respondent had not yet instituted a written attendance policy. Teeter testified that he decided to issue discipline to Emerson based on the policy that had been applied at Harsco. According to Teeter, when Harsco operated the facility, multiple absences would result in discipline

While the complaint alleges only that the suspension given to Emerson on November 25, 2013, violates Section 8(a)(3) and (1) of the Act, in his brief, the General Counsel also contends that the written warning given to Emerson on that date also violates the Act. Given the fact that Emerson was given both the written warning and suspension for the same two occurrences of being tardy and the fact that those documents were issued to him on the same date establishes that there is a close relationship between the two. I find that there is a sufficiently close connection between the written warning and complaint allegation regarding the suspension to consider the allegation that the written warning also violates the Act on its merits. *Hi-Tech Cable Corp*., supra.

Applying the *Wright Line* factors to the suspension and warning given to Emerson on November 25, 2013, the evidence establishes that Emerson is the primary proponent of the Union at the Respondent's Hickman, facility. In this regard, Emerson made the initial contact with the Union and organized the meetings with Gonzalez that were held on October 21 and 22. Emerson signed an authorization card and obtained blank authorization cards to solicit other employees to support the Union. He obtained the signatures of approximately six other employees on union authorization cards. When Lesslie informed Emerson that Barnes and Teeter believed Lesslie to be the ringleader of the union support at the facility, Emerson sent a text message to Rountree advising him that if Barnes and Teeter wanted to blame someone for bringing in the Union, they could blame him. He openly spoke about the Union at work to other employees and supervisors, including Knuth and Rountree.

The Respondent does not dispute its knowledge of Emerson's support for the Union and the evidence clearly establishes such knowledge. The Respondent's knowledge of Emerson's union activities is established by, among other things, Rountree's admission that he received a text message from Emerson indicating that he could inform Barnes and Teeter that if they wanted to blame someone for bringing in the Union, they could blame him. In addition, Knuth admitted that Emerson repeatedly told him that the employees were going to bring the Union into the Respondent's facility. The Respondent's animus to the union activities of its employees is

established by the unfair labor practices that I find it committed. Accordingly, the General Counsel has established a prima facie case under *Wright Line*, supra, and the burden shifts to the Respondent to establish it would have taken the same action against Emerson in the absence of his union activity.

The Respondent contends that the discipline imposed on Emerson was not based on his union activity but legitimate business considerations and was comparable to the discipline issued to other employees. In considering the other instances of employees who were disciplined for attendance issues, I note that all of the incidents occurred after the November 25, 2013 warning given to Emerson. While such evidence is relevant, I believe it must be closely scrutinized, since the issuance of discipline after November 25, 2013, could be influenced by the fact that a charge had been filed over the discipline given to Emerson. I also note that in early February 2014, the Respondent finally issued to the employees at the Hickman facility an attendance policy. (GC Exh. 11.) According to the credited testimony of Emerson, when he received his copy of the attendance policy, he was advised by Knuth that the policy would become effective on February 17, 2014, and that all of the employees would begin with 0 points. The February, 2014 attendance policy is a point system based on a 12 month rolling period. With respect to the issues in this case, the relevant provisions of this policy provide:

> Failure to punch in or out will be treated as a late punch or early leave.
> A late punch in or in early punch out will count as a half point.
> An unscheduled missed day will count as 1 point.
> Consecutive days for the same illness will only count as one point except during weekends (Friday-Monday) . . . When off on Friday-Monday each day will count as one point.
>
> 3 points unexcused absences in a 12 month period -verbal warning
> 4th point absence in a 12 month period-written warning
> 5th point absence in a twelve-month period-1 day suspension

Before the institution of the Respondent's new attendance policy on February 17, 2014, the following employees were disciplined for attendance-related issues. On December 29, 2013, J. P. Pattillo was given a written warning for arriving late for work (R. Exh. 34G). On January 25, 2014, Johnny Payne was late for work and received a written warning (GC Exh. 54). On January 25, 2014, William Fender arrived late for work and received a verbal warning (GC Exh. 55). On January 25, 2014, Frankie Torres was given a verbal warning for reporting late for work (R. Exh. 34J).

After the implementation of the new attendance policy, on February 20, 2014, Dennis Chitester received a verbal warning for failing to report to work when scheduled. On the warning, Dennis Chitester indicated it was an excused absence and he had a doctor's note (R Exh. 29Z). On March 17, 2014, Zack Chitester was absent and received a verbal warning and 1 point (R. Exh. 29C). On March 18, 2014, Zack Chitester was tardy and received a written warning (R. Exh. 29 D). On March 19, 2014, Zack Chitester did not report for work and received a 1-day suspension. (R. Exh. 29E). On March 20, 2014, Mitch Wood received a verbal warning for reporting late for work (R. Exh. 29CC). Finally, on August 21, 2014, Dennis Chitester was

given a 1 day suspension because he had received 5.5 points under the Respondent's attendance policy implemented in February 2014.

With respect to the 1-day suspension given to Emerson on November 25, 2014, I note that Teeter testified that since the Respondent had not instituted its own attendance policy, he relied on the Harsco policy regarding multiple absences. However, the Respondent did not introduce the Harsco attendance policy that Teeter allegedly relied on. The Board has held that a respondent's bare assertion that it took action pursuant to a policy without proof of the existence of such a policy does not satisfy a respondent's *Wright Line* burden of proof. *GATX Logistics, Inc.* 323 NLRB 328, 333-334 (1997). In the instant case, the policy allegedly relied on was that of a previous employer and this also diminishes the persuasiveness of this evidence.

It is clear that the suspension issued to Emerson on November 25, 2013, was disciplinary in nature and it was for that reason that Emerson was instructed to not report for work on Sunday, November 24. His suspension was not because of Teeter's concern over his well-being. As noted above, Teeter determined that Emerson was capable of operating his pot carrier on Saturday, November 23. Given that, there was no reason for Teeter to be concerned about his ability to operate the equipment on November 24.

There is no evidence that the Respondent suspended any other employee for attendance prior to suspending Emerson on November 25, 2013. As noted above, Emerson was suspended for 1 day for being tardy on two consecutive days and had received no warning prior to his suspension. After Emerson was suspended, the only other employees that the Respondent issued one day suspensions for attendance were Dennis and Zack Chitester. Zack Chitester was not issued a 1-day suspension until his third day of consecutive absences and after he received a verbal and written warning for the first 2 days. Dennis Chitester was not given a 1-day suspension until he had received 5.5 points under the Respondent's attendance policy implemented in February 2014. Pursuant to that policy, the accumulation of 5.5 points could only result from multiple absences. I conclude that the evidence establishes that Emerson was treated disparately from Zack and Dennis Chitester. There is no evidence indicating that Zack and Dennis Chitester were known union supporters.

In order to meet the *Wright Line* burden, an employer must establish that it has consistently and evenly applied its disciplinary rules. *DHL Express, Inc*., 360 NLRB No. 87 JD slip op. at 7 (2014). I conclude that the Respondent has not met its burden under *Wright Line* to establish that it would have suspended Emerson for being tardy on 2 consecutive days, absent his union activity. Rather, I find that the suspension issued to Emerson was discriminatorily motivated and designed to to send a message to him and other employees that union supporters could be treated more severely than others regarding attendance issues. I therefore find that the 1- day suspension given to Emerson violates Section 8(a)(3) and (1) of the Act.

I reach a different conclusion, however, with regard to the written warning given to Emerson on November 25, 2013. In this connection, after Emerson's written warning, the Respondent issued a written warning to Pattillo for arriving late for work on December 29, 2013 and also issued a written warning to Johnny Payne on January 25, 2014, for the same reason. There is no evidence to indicate that Pattillo and Payne were known union supporters. On January 25, 2014, William Fender and Frankie Torres were given a written verbal warning for

reporting late for work. After the implementation of the Respondent's attendance policy in February 2014, Zack Chitester received a written warning for a second consecutive attendance infraction.

I find that the Respondent has met its burden under *Wright Line* and has established that it would have issued Emerson a written warning for his 2 consecutive days of reporting late for work even in the absence of his union activities. In this respect, the Respondent issued written warnings to Pattillo and Payne after arriving late for work on one occasion. After the implementation of its new attendance policy in February 2014, the Respondent issued a written warning to Zack Chitester after his second consecutive attendance infraction. In reaching this conclusion, I note, in particular, that the General Counsel produced no evidence of disparate treatment. In this regard, there is no evidence that any employee was tardy on 2 consecutive days and did not receive any discipline or a lesser form of discipline than Emerson received. Accordingly, I find that by issuing Emerson a written warning on November 25, 2013, the Respondent did not violate Section 8(a)(3) and (1).

Emerson's February 12, 2014 Suspension and Related 8(a)(1) Allegations Involving the Respondent's Handbook

The complaint alleges that certain of the Respondent's policies related to Emerson's February 12, 2014 suspension violated Section 8(a)(1) of the Act. Specifically, paragraph 7(a) of the complaint alleges that since October 2013, the Respondent has unlawfully prohibited employees from discussing the Union over the radio while permitting employees to talk about other nonwork subjects over the radio.[31] Paragraph 7(b) of the complaint alleges that since February 1, 2014, the Respondent has unlawfully prohibited its employees from:

(1) Discussing employee information with coworkers and others.
(2) Discussing discipline with coworkers and others.
(3) Engaging in conduct that reflects adversely on the Employer.
(4) Making false or malicious statements about employees.

Paragraph 7(c) of the complaint alleges that since February 2014, the Respondent has maintained the following social networking and blogging policies:

(1) Employees are not permitted to use any company logos or graphics without first obtaining permission.
(2) The Employer may request at its sole and absolute discretion, that you temporarily confine your website, web log, or other commentary to topics unrelated to the Employer if it believes this is necessary or advisable to ensure compliance with laws or regulations.

Paragraph 7(d) alleges that since February 2014, the Respondent has maintained the following employee conduct and work rules prohibiting:

[31] Earlier in this decision I found that the Respondent, through Rountree in October 2013, violated Section 8(a)(1) of the Act by prohibiting employees from discussing the Union on channel 15 of the radio while permitting employees to discuss personal matters not involving the Union

(1) Boisterous or disruptive activity in the workplace.
(2) Conduct reflecting adversely on you or the Employer.
(3) Making or publishing false and malicious statements concerning an employee supplier, client, or the Employer.

Paragraph 8 of the complaint alleges that the Respondent issued a 3-day suspension to Emerson because he violated the prohibitions set forth above in paragraph 7(a) and (b)(1) and (2) in violation of Section 8(a)(3) and (1) of the Act.

In addressing these allegations, I turn first to the allegations of the complaint directly related to the February 12, 2014 suspension of Emerson. As noted earlier in this decision, channel 15 on the Respondent's radio is an "all talk" channel on which employees from both the Respondent and Nucor discuss a variety of topics including politics, hobbies, and items for sale. On February 11, 2014, a Nucor employee Eddie Jones asked Emerson where Brandon Lesslie had been. Emerson responded that Lesslie had been given a 5-day suspension. Later that same day, Nucor supervisor Joe Hicks sent an email to Mike Ross regarding Emerson's conversation with Jones. The email (R. Exh. 11C) states:

> I do not know who the Phoenix teammate was on channel 15 today, but they were sharing info with Nucor teammates that I do not think is anyone's business. I am sure it has legal ramification if the employee being talked about wanted to push it. The conversation was about a Phoenix teammate named Brandon getting a 5 suspension by Phoenix. The Phoenix teammate was talking to Eddie Jones one of our ladle brickers.I am just sharing this with you so you can handle it however you please. We do not share employee discipline with teammates and we do not allow anyone to talk about it in our presence. The radio is no place stuff. I am sure you agree.

Ross discussed this matter with Barnes and Teeter. Barnes, Teeter, and Ross determined that it would be appropriate to suspend Emerson for his statement to a Nucor employee that Lesslie had been suspended. Teeter forwarded Hicks' email to Klee for review and Klee testified that she informed Teeter that it was against the Respondent's policy for employees to talk about other employees' disciplinary actions. (Tr. 1343.)

On February 12, 2014, Emerson met with Teeter, Barnes, and Ross and Teeter's office. Teeter issued Emerson a corrective disciplinary form for a 3-day suspension (GC Exh. 9). The suspension provides:

> Discussing a co-workers discipline with our customer on a company radio, employee information/discipline is confidential and must not be discussed with anyone. Phoenix Services LLC expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization. Discussion of this employee's discipline on the radio is unauthorized use of employer-owned equipment, unauthorized disclosure of confidential proprietary information, conduct that reflects adversely upon you or Phoenix Services LLC, making or publishing false or malicious statements concerning an employee, and

> engaging in unethical or illegal conduct. Furthermore Nucor does not share employee discipline with teammates and does not allow anyone to talk about it in their presence. To ensure orderly operations and provide the best possible work environment employee discipline must remain confidential, discussion of any employee information with anyone will not be tolerated.

Emerson credibly testified that prior to his suspension he was never informed that he could not discuss discipline issued to other employees. As noted previously, the only known restriction of what could be discussed on channel 15 was the use of "cuss words."

Teeter testified that the Respondent began distributing a new employee handbook (GC Exh. 5) to employees on approximately February 12 and began enforcing those policies on February 17 (Tr. 889). Teeter admitted using some of the language from the Respondent's newly issued handbook (GC Exh. 5)[32] in drafting the suspension. In this regard, the handbook in section 701 contains rules prohibiting the conduct referred to in paragraph 7(d) of the complaint set forth above. The handbook, however, does not contain any prohibitions regarding discussing employee information or discipline with "anyone." Teeter testified that he also issued a 3-day suspension on February 12, 2014, to Rountree for discussing a coworker's discipline with another employee. When Emerson returned from his suspension on February 20, 2014, Knuth gave him a copy of the Respondent's handbook, which Emerson had not previously seen.

It is clear that by issuing Emerson a written suspension for discussing the discipline of another employee with an employee of Nucor and indicating in that suspension that employee information and discipline is confidential and must not be discussed with "anyone," the Respondent promulgated a new policy regarding the disclosure of such information. It is also clear that Respondent issued the discipline, at least in part, pursuant to the newly issued handbook as Teeter admitted that he drafted the suspension in accordance with the language in the handbook and the language of some of the handbook rules appears in the suspension notice.

Based on the above, I find that Emerson was suspended pursuant to a newly promulgated policy prohibiting the dissemination of employee information and discipline to "anyone." I also find that Emerson was suspended pursuant to the provisions of the new handbook prohibiting conduct that reflects adversely upon the Respondent and making "false and malicious statements concerning an employee."

Initially, I turn to a consideration of whether the newly promulgated rule prohibiting the disclosure of employee information and discipline to "anyone" and the provisions of the Respondent's handbook that are specifically referred to in Emerson's suspension are facially unlawful and will then address the issue of whether his suspension was unlawful

In determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act, the Board determines whether it reasonably tends to chill employees in the exercise of their

[32] The front page of the handbook indicates that the handbook is the "September 2013 Edition" but it is undisputed that the handbook was not distributed to the Respondent's Hickman facility until February 2014. According to Klee's uncontradicted testimony the process of rewriting the employee handbook was not completed until January 2014.

Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999). In *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004), the Board indicated that if a rule explicitly restricts Section 7 rights, it is unlawful. The Board further noted that if it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647. In *Lutheran Heritage Village*, the Board further indicated that in determining whether a challenged rule is unlawful it must give the rule a reasonable reading. Id. at 646.

With respect to the Respondent's promulgation of its policy regarding the disclosure of employee discipline to "anyone" contained in Emerson's February 12, 2014 suspension, I find that it violates Section 8(a)(1) of the Act pursuant to the criteria set forth in *Lutheran Heritage Village.* While this policy does not explicitly restrict Section 7 rights, I find that employees would reasonably construe it to prohibit Section 7 activity. I find that the restrictions set forth in the written suspension issued to Emerson would reasonably be understood by him and other employees to restrict discussion of terms and conditions of employment, including discipline, with other employees. In addition, by precluding discussion of discipline with "anyone" employees would reasonably interpret this policy as prohibiting such communications with third parties such as Board agents and union representatives, thus making the policy unlawful for that reason as well. In this connection, the Board has consistently found rules broadly prohibiting the disclosure of employee information to be facially overbroad and violative of Section 8(a)(1) of the Act. In *Hyundai America Shipping Agency, Inc*., 357 NLRB No. 80, JD slip op. at 12 (2011), the Board found a rule unlawful that prohibited "[a]ny unauthorized disclosure from an employee's personnel file"*).* See also *Cintas Corp*., 344 NLRB 943 (2005) enfd. 42 F.3d 463 (D.C. Cir. 2007) (unlawful rule required employees to maintain "confidentiality of any information concerning the Company, its business plans, its partners (employees), new business efforts, customers, accounting and financial matters."); *IRIS U.S.A., Inc*., 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (finding a rule unlawful that stated all information about "employees is strictly confidential" and defined "personnel records" as confidential); *University Medical Center*, 335 NLRB 1318 (2001) (finding unlawful a rule prohibiting "release or disclosure of confidential information concerning patients or employees."); and *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999) (finding unlawful a code of conduct that prohibited employees from revealing confidential information about customers, hotel business, or "fellow employees.")

I also find that this rule has been applied to restrict the exercise of Section 7 rights. As the cases set forth above indicate, employees have a right to discuss conditions of employment such as employee discipline with others. The Respondent suspended Emerson for the exercise of this protected right.

With respect to the reference in Emerson's suspension to engaging in conduct that reflects adversely on the Respondent, I note that such a restriction is contained in the handbook that was distributed in mid-February. I find that this rule is unlawful because employees would reasonably construe its broad prohibition against "Conduct that reflects adversely upon you or Phoenix Services LLC" as encompassing Section 7 activity such as employee's protected statements to coworkers, or third parties who deal with the Respondent regarding their working conditions and seeking the support of others in improving them. There is nothing in the rule that

would reasonably suggest to employees that Section 7 rights are excluded from the rule's reach. The Board has consistently held such rules to be overly broad and unlawful. In *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) the Board found a rule unlawful that prohibited "derogatory attacks on . . . hospital representative[s]. In *Claremont Resort & Spa*, 344 NLRB 832 (2005), an unlawful rule prohibited "negative conversations about associates and/or manager's". Finally in *Beverly Health & Rehabilitation Services* 332 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir. 2002) an unlawful rule prohibited "[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates." In addition, since the language of this rule was contained in Emerson's suspension it was clearly utilized to restrict the Section 7 rights of employees to discuss the Respondent's discipline of employees with others.[33]

The portion of the handbook prohibiting the "making or publishing false and malicious statements concerning an employee, supplier, client or Phoenix Services LLC" is also unlawfully broad. *Beverly Health & Rehabilitation Services*, supra. *Universal Fuels, Inc*. 298 NLRB 254 (1990). In addition, this rule was also used to restrict Emerson's Section 7 rights since it was referred to in his suspension.

Having found that the Respondent has promulgated, maintained, and enforced unlawfully broad rules I turn to the issue of whether the suspension issued to Emerson pursuant to these unlawfully broad rules is violative of the Act. In *Continental Group*, Inc., 357 NLRB No. 39 (2011), the Board clarified to discipline pursuant to unlawfully broad rule is unlawful only if the employee "violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concern underlying Section 7." In the instant case, it is clear that Emerson was engaged in lawful Section 7 activity by telling a Nucor employee that Lesslie had been suspended. Accordingly, this suspension issued to Emerson pursuant to unlawfully broad rules violates Section 8(a)(3) and (1) of the Act.

The Respondent's Maintenance of Allegedly Unlawfully Broad Work Rules

Paragraph 7(d) of the complaint alleges that the Respondent has maintained a work rule prohibiting "Boisterous or disruptive activity in the workplace." This provision, while maintained in section 701 of the Respondent's handbook that was distributed to employees in February 2014, was not referred to in the suspension notice issued to Emerson. Consequently, it is the mere maintenance of this policy that is alleged to be unlawful. When the issue is whether the mere maintenance of a policy violates Section 8(a)(1), the Board instructs that I must give the policy a reasonable reading and refrain from reading particular phrases in isolation. *Lutheran Village Heritage*, supra at 646. I find that applying that standard, employees would reasonably construe this rule as prohibiting Section 7 activity. Certainly the discussion of union or protected

[33] I find that the employee handbook was not promulgated in response to the union activity at the Hickman facility. I credit Klee's uncontradicted testimony that the Respondent began to revise the handbook in approximately September 2013 but those revisions were not completed until January 2014 and distributed to all its facilities afterwards. While the union organizing campaign at the Respondent's Hickman facility began in earnest in October 2014 I note that the Respondent has multiple facilities throughout the United States. This handbook was distributed to all of the Respondent's facilities and therefore I find that it was not promulgated in response to the employee's union activities at the Hickman facility.

concerted activity could reasonably be viewed by employees as "disruptive activity" and thus violative of the rule. The Board has recently found similar rules to be facially overbroad and violative of Section 8(a)(1) of the Act. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 3 (2014) (finding unlawful a rule prohibiting insubordination or other disrespectful conduct); *First Transit, Inc.* 360 NLRB No. 72, slip op. at 2-3 (2014) (finding unlawful a rule prohibiting "{d}iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public. Disorderly conduct during working hours.") Accordingly, I find that the Respondent's rule prohibiting "boisterous or disruptive activity in the workplace" is overbroad and violates Section 8(a)(1) of the Act.

I find the instant case to be distinguishable from the Board's decision in *Tradesmen International*, 338 NLRB 460, 460-463 (2002). There, the Board found a rule prohibiting conduct that was "disloyal, disruptive, competitive or damaging" to be lawful. In that case, however, the rule was among a list of 19 rules which prohibited serious misconduct such as "sabotage and sexual or racial harassment." In the instant case, the Respondent's rule does not contain any language that would restrict its application and thus I find it to be overbroad.

Paragraph 7(c) of the complaint alleges that since February 2014 the Respondent has maintained social network and blogging policies that were overly broad and violated Section 8 (a)(1) of the Act.

The first such rule provides that: "Employees are not permitted to use any company logos or graphics without first obtaining permission."

Although the General Counsel claims that the mere maintenance of this policy violates Section 8(a)(1), his brief does not contain any cases that directly support this proposition. As I have previously indicated, pursuant to *Lutheran Village Heritage*, supra, I must give the policy reasonable reading, and refrain from reading particular phrases in isolation or presuming interference with employee rights.

I find that the Respondent's policy regarding the use of its logos or graphics would not be reasonably understood by employees to interfere with Section 7 rights. There is no evidence in this case that the Respondent's policy regarding its logo has been applied, in any way, to limit the rights of employees to engage in union or protected concerted activity. Under the circumstances present here, I do not find that the mere maintenance of the Respondent's policy regarding the use of its logo or trademark restricts the Section 7 rights of employees and accordingly I shall dismiss this allegation in the complaint.

Finally, paragraph 7(c) of the complaint alleges that the maintenance of the following provision of the Respondent's social network policy violates Section 8(a)(1).

> The Employer may request at its sole and absolute discretion, that you temporarily confine your website, web log, or other commentary to topics unrelated to the Employer if it believes this is necessary or advisable to ensure compliance with laws or regulations.

Once again, the General Counsel's brief does not contain any direct support for his position. Applying the policies set forth above in *Lutheran Village Heritage*, supra, I find that this aspect of the Respondent's social networking policy would not be reasonably understood by employees to interfere with Section 7 rights. The rule indicates that the Respondent would only seek to impose this limitation on the social network use of employees if it was necessary to comply with a law or regulation. There is no evidence to establish that the Respondent's policy has been applied in a manner that suggests it would restrict the rights of employees to engage in Section 7 activity. Accordingly, I find that policy on its face does not violate Section 8(a)(1) of the Act and I shall therefore dismiss this allegation in the complaint.

The Warning Alleged to be Issued to Emerson on March 5, 2014

Paragraph 14(j) of the complaint alleges that the Respondent issued a written warning to Emerson on March 5, 2014, in violation of Section 8(a)(3) and (1) of the Act.

Emerson was the only witness to testify regarding this allegation. On March 6, 2014, Emerson became stuck in his driveway because of a snow and ice storm. Emerson called Knuth and informed him that he was stuck and asked Knuth to stop by his house so that he could get a ride in to work with him in case he was not able to clear his driveway. Emerson was scheduled to work at 6 a.m. and Knuth was scheduled to arrive at 7 a.m.

Emerson was able to clear his driveway and informed Knuth that he was on his way to work and would not be necessary for Knuth to pick him up. Emerson arrived at work sometime after 7 a.m. Once Emerson arrived at work, Knuth showed him on the computer a corrective disciplinary form that he had prepared regarding Emerson. The document in the computer indicated that the disciplinary action was one half a point under the Respondent's attendance policy. According to Emerson's credited testimony, the corrective action to be taken was "to invest in purchasing a monster 4 x 4 truck."[34] Knuth told him that this was a joke writeup because Emerson had gotten stuck in the snow storm. Emerson testified that he did not consider this incident to be disciplinary action (Tr. 229).

A threshold requirement in establishing a violation of Section 8(a)(3) and (1) of the Act is that there is evidence that an employee's employment conditions were adversely affected by an employee's union or other protected activities. *Wright Line*, supra at 1083. Under the circumstances of this case, I find that the Respondent took no adverse action against Emerson on March 6, 2014. Rather, this incident involved a joke between Knuth and Emerson and did not result in formal discipline being issued to Emerson. Further supportive of the fact that no discipline was issued to Emerson on March 6, 2014 is a summary of employment actions taken by the Respondent regarding Emerson since June 1, 2013 (GC Exh. 41). This document does not reflect the March 6, 2014 warning. Accordingly, since this incident did not result in any adverse action against Emerson, I shall dismiss this allegation of the complaint.

[34] The document introduced into evidence regarding this matter (GC Exh. 12) is blacked out under the corrective action section of the document. This document is not signed by either Knuth or Emerson and there is no evidence that Emerson was ever given a copy of what he had seen in the computer.

The April 23, 2014 Written Warning Issued to Emerson

On April 23, 2014, Emerson reported to work late because he had a flat tire on the way to work. On that same date, Emerson was issued a written warning for being tardy by Knuth (GC Exh. 34). According to the Respondent's attendance policy that was implemented in February, 2014, an employee must accumulate four points in a 12-month period to receive a written warning. The policy further indicates that an employee will receive one half a point for a late punch. As noted above, the Respondent granted amnesty to employees for their attendance record prior to the implementation of the new policy. The summary of employment actions (GC Exh. 41) regarding Emerson reflects that he had not received any points from February 2014 until April 23, 2014.

As noted above, the General Counsel has clearly established a prima facie case under *Wright Line* with respect to adverse employment actions taken against Emerson. It is also clear that the Respondent issued a written warning to Emerson for his being tardy on April 23, 2014, instead of merely issuing him a half point for a late punch in as set forth in the February 2014 attendance policy.

As set forth above, after the implementation of the Respondent's new attendance policy in February 2014, Mitch Wood received a verbal warning for his first occurrence of reporting late to work. While the Respondent did not correctly apply the provisions of its new attendance policy to Wood, since a verbal warning should not be issued until an employee had accrued three points in a 12-month period, the discipline issued to Wood was less than the discipline issued to Emerson. There is no evidence that Wood was known to be a union supporter. This clearly establishes that Emerson was treated in a disparate manner.

I find that by issuing a written warning to Emerson for his first occurrence of being tardy on April 23, 2014, the Respondent deviated from the standard set forth in that policy. I also find that Emerson was treated more severely than Wood. I find that the evidence clearly establishes that the Respondent's motivation in issuing the warning to Emerson was his union activity. In order to meet the *Wright Line* burden, an employer must establish that it has consistently and evenly applied its disciplinary rules. *DHL Express, Inc*., 360 NLRB No. 87, JD slip op. at 7 (2014*); Septix Waste*, *Inc.* 346 NLRB 494, 495-496 (2006). The Respondent has not met that burden in this case. Accordingly, I find that the April 23, 2014 warning issued to Emerson violates Section 8(a)(3) and (1) of the Act.

The August 7, 2014 Written Warning Issued to Emerson

On August 7, 2014, Emerson overslept and reported late for work. Later that day Emerson met with Teeter and Ross in Teeter's office, Teeter asked Emerson what happened and Emerson candidly admitted that his alarm clock did not wake him and he overslept. Emerson credibly testified that Teeter issued Emerson a 1-day suspension for reporting to work late. Emerson explained to Teeter that he had not accumulated enough points under the attendance policy to receive his suspension, as the only other time he had been tardy was April 23, 2014. Teeter then retracted the suspension but issued Emerson a written warning for being tardy (GC, Exh. 35).

I again note that the General Counsel has established a prima facie case under *Wright Line* with respect to adverse actions taken against Emerson. By issuing a written warning to Emerson on August 7, 2014, for being tardy instead of issuing him a half point under the attendance policy, the Respondent once again acted contrary to the express provisions of its policy. Since the implementation of the Respondent's new attendance policy in February 2014, there is no evidence of an employee who was treated similarly to Emerson for accruing two instances of tardiness. On March 18, 2014, Zack Chitester was tardy and received a written warning. However, the day before he had been absent entirely and had received a verbal warning and 1 point under the attendance policy. Since Zack Chitester's situation involved an absence for an entire day and then a tardy, I do not find it comparable to Emerson's situation. As I have noted above, it is the Respondent's burden to establish that it has consistently and evenly applied its disciplinary policy I find that it has not done so with regard to this written warning. Accordingly, I find that the written warning issued to Emerson on August 7, 2014 was motivated by his union activities and violates Section 8(a)(3) and (1) of the Act.

There is no allegation in the complaint regarding the August 7, 2014 written warning, although the General Counsel contends in his brief that the warning violates Section 8(a)(3) and (1). I find that the August 7, 2014 written warning is sufficiently related to the allegation in the complaint regarding the April 23, 2014 warning to consider it on the merits. *Hi-Tech Cable Corp*,.supra. Under the circumstances in this case, where such a blatant discriminatory action was taken against Emerson, the primary union adherent at the facility, I find that it would be manifestly unjust to Emerson to not consider this allegation on the merits, and provide an appropriate remedy.

Brandon Lesslie

The complaint alleges that the Respondent took the following actions against Lesslie in violation of Section 8(a)(3) and (1) of the Act: during the period between November 22 and 29, 2013, refused to return Lesslie to work (paragraph 14(d) as amended at hearing); on December 6, 2013 issued Lesslie the written warning, a 3-day suspension, and refused to allow him to work scheduled overtime (paragraph 14 (e)); on February 7, 2014 issued Lesslie a written warning, removed him from his pot carrier position and transferred him to a pressure washer position; cut his pay and changed his hours (paragraph 14 (f)); and on February 14, 2014, discharged Lesslie (paragraph 14(i)). The complaint also alleges that all of the adverse actions taken against Lesslie from December 6, 2013, onward also violated Section 8(a)(4) and (1) of the Act because they were motivated by Lesslie's cooperation with the NLRB. I will address the 8(a)(4) allegations after first addressing the 8(a)(3) allegations. Finally, the complaint also alleges that the Respondent violated Section 8(a)(1) with regard to statements made by various supervisors to Lesslie during the period from November 22 until his discharge.

The General Counsel's Prima Facie Case under *Wright Line* Regarding the Adverse Employment Actions Taken Against Lesslie

I find that with respect to all of the allegations in the complaint that the Respondent violated Section 8(a)(3) and (1) regarding the adverse employment actions taken against Lesslie noted above, the General Counsel has established a prima facie case under *Wright Line.* Lesslie was an active and open supporter of the Union prior to November 22. In this connection, in July

2013, Lesslie began to talk about organizing a union at the Respondent's facility with Emerson and the other employees on the C crew. (Tr. 306.) On October 18, Lesslie, Brothers, and Emerson openly discussed their support for the union in the presence of Rountree. On October 22, Lesslie attended a meeting with Union Organizer Gonzalez at which he signed an authorization card and returned it to Gonzalez. Lesslie also took blank authorization cards from Gonzalez in order to solicit other employees to join the Union. Lesslie also took the union pamphlet on organizational rights and the business card of Gonzalez.

According to Lesslie's credited testimony on October 23, Rountree called Lesslie and asked him who had attended the union meeting and also told him that Barnes and Teeter thought that Lesslie was the ringleader of the Union. Lesslie informed Rountree that it was more than C crew that was interested in the Union but that that he was not the ringleader movement. As set forth in detail above, on October 23, Lesslie met with Barnes and Teeter and extensively discussed the support of Lesslie and other employees for the Union. Moreover, the Respondent does not dispute that Teeter and Barnes knew of Lesslie's support for the Union. Accordingly, it is clear that the Respondent had knowledge of Lesslie's support for the Union long before November 22, 2014.

As I have indicated earlier in this decision, the substantial number of other labor practices that I find the Respondent has committed at the Hickman facility clearly demonstrates its animosity toward the union activities of its employees. Accordingly, I find that the General Counsel has presented a prima facie case under *Wright Line* with regard to the 8(a)(3) and (1) allegations in the complaint regarding Lesslie. Thus, the Respondent has the burden of establishing that for each of these allegations, it would have taken the same action in the absence of Lesslie's union activities

The Alleged Refusal to Allow Lesslie to Return to Work Between November 22 and 29, 2013

In approximately mid-November Lesslie injured a finger and developed a staph infection. On November 21, 2013, Lesslie informed Teeter that his doctor instructed him to take off work for a couple of days. According to Lesslie, Teeter said that was fine but that he had to see a company doctor before he could return to work and that he would not be paid during his absence. On November 21, Lesslie sent a text message to Teeter thanking him and telling him that he will be returning to the doctor on Monday, November 25. The text message further indicates "Gives time to heal and cultures will be back." Finally the text message indicates that Lesslie would call Teeter on Monday, November 25 (R. Exh. 17C).

Lesslie testified that he called Teeter again on November 27 or 28. According to Lesslie, he told Teeter the doctor had already released him "2 or 3 times" and that he did not see what the problem was in returning to work. Without explaining how it occurred, Lesslie testified that he returned to work on November 29, 2013. Lesslie admitted that prior to returning to work, his staph infection had spread to his upper right leg. On November 29, the infection on his upper right leg began seeping through his bandage as he was working on his pot carrier.

On November 29, Lesslie worked the night shift and reported his seeping infection to his supervisor, Perry, at the end of the shift on the morning of November 30. Perry instructed him to report the situation to Teeter. Lesslie then called Teeter. According to Lesslie, Teeter told him to

stay off from work until the infection was healed. Lesslie testified in a confusing manner regarding this conversation. While Lesslie said that Teeter mentioned something signing a card under the Family Medical Leave Act, he also testified, however, that Teeter asked him, "Did I sign the union card, whether it might protect me or something like that. Did you sign it? It'll protect you or something, in the sense of if I signed FMLA card, I would be protected. That's what he was meaning on the phone." (Tr. 380.) Lesslie testified that he returned to work on December 2, without explaining how he happened to return on that date.

Teeter testified that in late November 2013, Lesslie met with him and told him that he had injured his finger and it had become infected. Lesslie showed the infected finger to Teeter and told him that it was a staph infection. Lesslie added that he had been given antibiotics the day before but they were not working and he needed to go back to the doctor because the infection was getting worse. Teeter agreed that Lesslie needed to be examined and Lesslie left work early that day. On the next morning, November 21, Lesslie and Teeter spoke by phone. Leslie said that the doctor had taken a culture and that he needed to take a few days off to wait on the culture before returning to work. Lesslie informed Teeter that the doctor had told him that the infection was contagious and that he could spread the infection to coworkers. Lesslie added that he did not want to come to work and spread his infection on his machine and give it to anybody else. Teeter said it was fine for Lesslie to take time off and that he appreciated Lesslie's concern because he did not want him to come to work and make anybody else sick. Teeter indicated that Lesslie needed to get a release from his doctor saying that he was okay to go back to work before he could return.

Teeter testified that he had multiple conversations with Lesslie after he left work on November 20. During these conversations, Lesslie indicated that he had a continuing issue with the infection on his finger and it had spread to his upper leg. Teeter told Lesslie at one point that if he could not get a release from his doctor he might need to sign up for some time under the Family Medical Leave Act because no one knew how long this was going to take. While Lesslie never provided a release from his doctor, on November 29, he did send a text message to Teeter with the result of a culture test from his doctor (R. Exh. 17C). Lesslie reported to work on November 29 and there was no obvious infection on his finger. Teeter testified that Lesslie had trouble with the infection on his leg on November 29 and had to take additional time off. Lesslie finally returned to work on December 2 when there were no further visible signs of infection.

To the extent the testimony of Lesslie and Teeter conflict on this matter, I credit Teeter. While neither witness testified very clearly about this incident, Teeter's version appears more in conformance with the objective evidence contained in the text messages. Lesslie's testimony on this issue was somewhat disjointed and confusing and I find it to be unreliable.

Paragraph 10(a) of the complaint alleges that on November 29, 2013, Respondent, by Teeter, threatened employees with unspecified reprisals because of their continued union activity. Based on Teeter's credited testimony, there is no evidence that on November 29, 2013, he made any statements of that type to Lesslie. Accordingly, I shall dismiss the allegation in the complaint.

With respect to the complaint allegation that the Respondent refused to permit Lesslie to return to work from November 22 until November 29 in violation of Section 8(a)(3) and (1), as

noted above I find that the General Counsel has established a prima facie case. However, the Respondent has established a valid defense under *Wright Line.* I find that the Respondent had an objective, valid business-related reason for not permitting Lesslie to return to work any sooner. Despite the fact that Lesslie never produced a release from his doctor, based on the doctor's report Lesslie submitted to Teeter on November 29, and the fact that his finger did not show any continuing obvious signs of infection, Teeter allowed him to return to work. As the above evidence indicates, however, even on November 29, Lesslie's infection was not fully healed as the infection on his upper right leg seeped through his bandage onto his clothing as he was operating his pot carrier. There is no evidence to establish that the Respondent ever permitted an employee with an ongoing staph infection to continue working and expose other employees to the risk of such an infection. Based on the foregoing, I conclude that the Respondent had a legitimate business-related reason for refusing to return Lesslie to work prior to November 29, 2014, and would have taken this action in the absence of Lesslie's union activities. Accordingly, I shall dismiss the allegation in the complaint alleging that the Respondent refused to allow Lesslie to work from November 22 until November 29 for discriminatory reasons.

The December 6, 2013 Conversation Between Lesslie and Barnes and Teeter

Paragraph 11(a) of the complaint alleges that the Respondent, through Teeter, threatened to discharge employees because of their union activity, interrogated employees regarding their union activity, and threatened employees with unspecified reprisals because of their union activities. Paragraph 11(d) of the complaint alleges that the Respondent, through Barnes, threatened to discharge employees because of their union activity and implied employees would receive promotions if they refuse to cooperate in Board investigations.

On December 2, 2013, Lesslie spoke with a Board agent about meeting with her regarding the termination of Jacob Adams. On December 6, at 9:06 a.m., Lesslie sent a text message to Teeter stating, in relevant part, "Need to talk to ya today when you get a chance. . . . It is important!!!" (R. Exh. 17C.) Later that morning, Lesslie met with Teeter and Barnes in Barnes office. Lesslie recalled that Ross may have also been there. Lesslie told Teeter and Barnes that he had been contacted by a Board agent but that he did not wish to speak to her. Lesslie played a recording of the message the Board agent had left on his phone. Barnes asked Lesslie if he was going to talk to the Board agent. Teeter stated they were going to get everyone that had "double crossed" them and make it rough on them. Barnes stated that because they were in an "at will state," it gives him the right to fire employees whenever he wants to fire them.

Teeter asked him if he had met with an attorney or talked with one and Leslie replied that he had talked with one but had not had a meeting. According to Leslie, Barnes said that he was going to contact the "company's lawyer" to see if he had to speak to the Board agent. Barnes added that he was going to see if the Company's attorneys could "add me like I was a leadman and not have to speak with the Labor Board." (Tr. 425.) Barnes told Lesslie to come back to the office at approximately 4:30 p.m.

Later on December 6 at 1:35 p.m., Lesslie sent another text message to Teeter. In this message Leslie indicated, "If I am not covered by company lawyer not to have to speak to that lady Monday or Tuesday I need to go see my lawyer today!!" The text message further indicated that Barnes was checking to see if he was "covered by company lawyer." Lesslie's message

further stated that Barnes had indicated that it might be an hour before he knows. Lesslie's message indicated concern because he would not be able to see his personal lawyer until between 3 and 4 p.m. Finally, Lesslie's message indicated that while he did not want to talk to the Board Agent he did not want to ignore her. (R. Exh. 17D.) On December 6 at 3:25 p.m., Lesslie again sent another text message to Teeter. This message stated "Hey never mind good news I do not have to talk to her at all, lawyer said it is only a investigation, and just do not meet her or worry about it none. . . . Good news to me." (R. Exh. 17D.)

Teeter testified that after Lesslie sent the text message referred to above on the morning of December 6, Lesslie called him again and they spoke on the phone. According to Teeter, Lesslie told him he was concerned about a phone call from an NLRB agent who indicated she wished to speak to him. Teeter testified that Lesslie came to the office around lunchtime and met with him and Barnes in Barnes' office. Mike Ross may have also been there. According to Teeter, Lesslie said that "this lady" wants me to come and see her but that he told her he did not know anything about it and did not want to get involved. Lesslie asked Teeter and Barnes what he was supposed to do. Teeter replied if they need to talk to you, go and talk to them and that he had to cooperate with the NLRB. Teeter recalled Barnes saying he would call and talk to the Respondent's lawyer for Lesslie to find out if they can get a lawyer to speak to Lesslie regarding the matter. Teeter testified the meeting ended at that point. Teeter denied that he or Barnes told Lesslie did not have to respond to the NLRB investigator or threatened him in any way. Although Barnes testified at the hearing in regard to issues involving Lesslie, he did not testify regarding meeting with him on December 6.

I credit Lesslie's testimony to the extent it conflicts with that of Teeter regarding this meeting. Leslie's testimony regarding this meeting contained the type of detail that makes it believable. I also find his testimony to be inherently plausible. In this regard, Lesslie testified that Barnes told him that he was going to contact the Company's lawyers to see if Lesslie could be added as a leadman in order not to have to speak to the NLRB investigator. I doubt that Lesslie had such sophisticated knowledge regarding the intricacies of a NLRB investigation to attribute such a statement to Barnes if that statement was not in fact made. I also note that Lesslie's testimony was consistent with the objective evidence contained in his text messages sent to Teeter on December 6. I was not impressed with Teeter's testimony regarding this meeting. I find it implausible that he would have encouraged Lesslie to cooperate with the Board's investigation, given the animosity that he exhibited to the union's organizing campaign. I note, in addition, that Teeter's testimony is uncorroborated by Barnes.

Based on Lesslie's credited testimony, I find that the Respondent, through Teeter, threatened employees with unspecified reprisals because of their union activities when he stated that the Respondent was going to get everyone that had "double crossed" them and make it rough on them. I also find that, in the context of this meeting, Barnes' statement that because the Respondent's facility was in an "at will state" it gave him the right to fire employees whenever he wanted to, is an unlawful threat to discharge employees because of their union activity. I also find that his statement that he would see if he could add Lesslie as a leadman in order for him not to have to cooperate in the NLRB investigation, is an implied promise of a promotion. I find that all of this conduct is violative of Section 8(a)(1) of the Act. I do not find, however, that the Respondent unlawfully interrogated Lesslie regarding his union activities at this meeting. Lesslie's text message in his testimony established that he sought the meeting with Teeter and

Barnes in order to discuss an NLRB agent contacting him. Under the circumstances, I do not find Barnes' question to Lesslie regarding whether he was going to talk to the Board agent was unlawful interrogation. I also do not find, in this context, that Teeter's question of whether Lesslie had met with an attorney or talked with an attorney constitutes an unlawful interrogation. I also do not find that Teeter made any threat to discharge employees in this meeting. Accordingly, I shall dismiss those allegations in the complaint.

The Suspension and Discipline Issued to Lesslie on December 6, 2013, and the Resulting Loss of Scheduled Overtime

On December 6, 2013, at approximately 4:30 p.m., Lesslie met with Teeter and Barnes at the Respondent's office on the Hickman site. At this meeting Barnes gave Lesslie a 3-day suspension for the period between December 8 and 11 (GC Exh. 16) that indicated the following:

> Insubordination
> We have been instructed by Nucor to slag our pots with Medium Slag to control emissions. This was explained to you 3 days in a row after you questioned this practice three days in a row, after being told for the third time that it was to control emissions you had the pit loader slag your pot with hot slag.

Lesslie testified that Barnes told him that he was given the suspension because he was asking questions on the radio to his leadman, Knuth, about why they were using the medium slag and because he used hot slag to line his pot. According to Lesslie, when he tried to explain to Barnes about why he used hot slag in his pot, Barnes would not listen to him and told Lesslie that "he can do what he wants to do." (Tr. 406-407.)

Lesslie was also given a written warning (GC Exh. 15) at this meeting which indicated the following:

> After being instructed by your lead man multiple times to remain at the furnace you were parked on the pot carrier road for no apparent reason for an extended period.

Lesslie testified that he told Teeter and Barnes that the pot carriers always parked on the pot carrier road and that he was receiving the warning because of the union meeting. Barnes responded by saying that "they can do what they want to do." (Tr. 398.) Lesslie testified that at the end of the meeting he asked if he had to sign the suspension and the written warning. According to Lesslie, in response "they asked me if I signed a union card,"and Lesslie replied that "You know I didn't because you took mine." (Tr. 399.)[35]

Teeter testified that with respect to the suspension that Lesslie received on December 6, Lesslie had questioned slagging the pot with medium slag on numerous occasions and had been

[35] Leslie did not indicate whether Teeter or Barnes asked this question.

instructed that was what Nucor required the Respondent to do in order to control emissions.[36] Teeter testified that the reason that Lesslie was issued a suspension was not because he was inquiring about that, or that he used hot material in the slag pot, as Teeter conceded that "possibly needed to happen." According to Teeter, however, that decision to use hot slag was not Lesslie's to make. According to Teeter, the leadman is the one to decide that a change to the use of hot slag is warranted. Teeter testified that Lesslie had no authority to change the process.

With respect to the written warning that Lesslie received for parking on the pot carrier road, Teeter testified that Lesslie was parked away from his furnace and his leadman asked him to remain at the furnace on several occasions. Teeter testified that pot carriers should remain near the furnace since their job responsibility is to "swap" the pot out.

While Teeter did not specifically testify regarding any mention of the Union being made at this meeting, he testified generally that he never questioned employees about their union activity. Barnes did not testify regarding the meeting held on December 6 in which Lesslie was issued his suspension and written warning. I credit the testimony of Lesslie over that of Teeter to the extent they conflict with respect to the December 6 meeting regarding Lesslie's written warning and suspension. Lesslie's testimony regarding the meeting was detailed and consistent on both direct and cross-examination while Teeter's testimony was generalized regarding the issue of whether the Union came up in the meeting. In addition, his testimony was not corroborated by Barnes.

Leadman James Knuth testified about the incident regarding Lesslie's written warning and suspension. With respect to the warning Lesslie receive for parking on the pit road, on approximately December 4, Knuth reported to Teeter that Lesslie did not follow his instructions as to where to park the pit loader while waiting for the pot to be changed.[37] Teeter asked Knuth to put it in writing and Knuth prepared a note (R. Exh. 36D) indicating that on December 3 at the shift change, he talked to pot carriers, Kimbrell, Emerson, and Lesslie and told them that they were to stay at the furnaces while they are "running" and they were not to be watching from the "hill, shop or the south side of the # 1 slag out road." Knuth's note further indicates that on the next night shift he noticed Lesslie waiting to be called to the furnace on the "south end of # 1 slag out road." Knuth's note also indicates that he observed Lesslie waiting in the same area later in the shift. Knuth did not testify that he gave Lesslie multiple instructions during the shift to park closer to the furnace nor does his note contain any reference to him giving more than one instruction and to Lesslie regarding this issue during that shift.

With respect the events leading to Lesslie's suspension, Knuth testified that he had instructed the employees on his crew to use medium slag. He testified that he told Lesslie this three or four times but Lesslie continued to ask why they were using medium slag. The last time

[36] No one from Nucor testified regarding this issue, nor were any documents regarding this issue introduced into evidence. Teeter explained, however, that slag is placed into the bottom of the pot to protect it and to keep the hot slag from the furnace sticking to or burning through the pot. Teeter testified that hot slag will generate a dust cloud when it is dropped into the pot and that medium slag is a suitable alternative that does not generate a lot of dust. The record establishes that medium slag has been processed but hot slag is dug up out of the pit, has not been processed and is still glowing red.

[37] The record establishes that a pot carrier can wait from approximately 35 to 50 minutes to receive a call from the furnace operator to change the pot underneath the furnace.

that Lesslie asked this was in the early morning on December 4. Knuth always replied that they were using it for dust control.

Before the beginning of the shift that started at 6p.m. on December 3 an ended at 6 a.m. on December 4, Knuth told pit loader Kyle Allison that he was to put medium slag in the pots in order to line them. In early morning of December 4, over the radio Knuth heard Lesslie tell Allison to put hot slag into his pot. Knuth attempted to call Allison on the radio to instruct him to use medium slag but could not get through to him. Afterwards, when Knuth spoke to Allison and told him to put medium slag in the pots. Allison said he would. Knuth also spoke to Lesslie and told him the same thing. Lesslie said he did not understand why they were doing it. At the end of the shift, Knuth reported this incident to Teeter who asked him to make a written note of the incident, and he did so. (R. Exh. 36E.)

With respect to the suspension that Lesslie received over the slag incident, Lesslie admitted asking Knuth why they were using medium slag. According to Lesslie, medium slag can have a lot of moisture in it and the pot then "blows up" when hot molten slag is poured on it. Lesslie testified that Nucor personnel had asked him what was different with the pots because they were "blowing up" at the furnace Leslie testified that hot slag does not contain moisture in it and does not "explode."[38]

Lesslie testified without contradiction that he had spoken to Ross the week before receiving his suspension on December 6 about using hot slag if Lesslie felt the conditions were wet. Ross told him to do what he needed to do to protect the pots and not get anybody hurt. According to Lesslie, Ross said that he would let the pot carriers make the call as to what to use. Lesslie also testified before Allison put the hot slag into his pot on the morning of December 4 he asked Knuth if he could use hot slag but did not get a clear response.[39]

Allison was not given any discipline for his role in this incident. When Lesslie returned from his suspension on December 12, Leadman Andrew Ashley gave Lesslie a copy of new pot carrier rules. (GC Exh. 36.) Insofar as relevant to this incident, the new rules provide that pot carriers must stay at their furnace in the event of a possible boilover and that "All pots must be skulled and slagged with a full bucket of medium slag before returning to furnace, no exceptions must call Rodney Barnes for authorization." According to Lesslie's uncontradicted and credited testimony, the Respondent did not have any written rules for pot carriers prior to his suspension and he had never seen the rules given to him by Ashley on December 12, prior to his suspension.

With respect to the warning that was given to Lesslie for parking on the pot carrier road "for an extended period for no apparent reason," as noted above, Lesslie was working as a pot carrier on furnace 1 at the time. According to the credible testimony of Emerson, the road that goes from furnace 1 to the slag pit is approximately 150 yards. The road is straight and ends at

[38] Leslie's testimony is corroborated by Brothers who testified that medium slag can have moisture in it and become explosive when hot slag from the furnace is poured over it (Tr. 547-551, 605-606). In July or August 2013, Brothers observed a pot explode when hot slag was poured into a pot lined with medium slag (Tr. 607).

[39] I credit Leslie's testimony on this point. I find that it is plausible given the evidence indicating that there is an element of judgment as to what slag to use to line the pot. In addition, Knuth did not specifically deny being asked by Lesslie as to whether he could use hot slag on the occasion in question.

the hill immediately before the slag pit. The road to furnace 1 is for pot carriers only and no other traffic uses it. Emerson explained that furnace 1 is visible from any vantage point on the road leading to it. Emerson testified that a pot carrier can park anywhere on the road to furnace 1 and be able to see the pot underneath the furnace and maintain contact with the furnace operator. Emerson explained that the road to furnace 2 is different. For one thing, because of the configuration of the mill, there is only approximately 50 yards of the road leading to furnace 2 where the furnace is visible to a pot carrier operator. Emerson testified that he generally parks 20 yards from the furnace on the road to furnace 2 so that he can see the pot underneath the furnace.

I find that the General Counsel has established a strong prima facie case under *Wright Line* that the suspension and warning given to Lesslie was motivated by his union activity. In addition to the evidence regarding unlawful motivation discussed above, at the meeting itself when Lesslie stated that he was only receiving the written warning because he attended the union meeting Barnes responded by saying that the Respondent could do what it wanted to do. Lesslie was also unlawfully interrogated again as to whether he had signed the union card.

I find that the Respondent has not established a valid *Wright Line* defense to the allegation that Lesslie was issued a written warning on December 6, in violation of Section 8(a)(3) and (1). The Respondent did not speak to Lesslie about the incident leading to the warning before the meeting held on December 6. At the meeting, when Lesslie attempted to explain the circumstances, Barnes was not interested in hearing his explanation. The Board has found an employer's failure to conduct a fair and full investigation and to give an employee the opportunity to explain his or her actions before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Printing Co.,* 317 NLRB 933, 938 (1995) enfd. 106 F.3d 41 (6th Cir. 1996). I note that the Respondent had no written rules for pot carriers prior to the discipline issued to Lesslie on December 6. With respect to the written warning for parking on the road leading to the furnace, Lesslie's testimony establishes that he was parked in the area in which pot carriers normally parked on the road to furnace 1. Emerson's credited testimony establishes that furnace 1 and the pot can be observed at any point on the 150 yards of road leading to the furnace. There certainly no evidence to establish that the location at which Lesslie was parked caused any delay in his servicing the furnace. The Respondent did not establish the reason for the reference to parking for an extended period since the record establishes that, in the normal order of things, a pot carrier has to wait between 35 and 50 minutes before changing the pot. While I find that during the shift that began at 6 p.m.on December 3 and ended at 6 a.m. on December 4, Knuth instructed Lesslie, Emerson and another pot carrier to park closer to furnace 1, this instruction was given on one occasion and not multiple occasions as the warning asserts. When all the circumstances are considered, I find Lesslie's failure to specifically adhere to this directive does not establish that the Respondent would have issued a written warning to Lesslie for this incident, absent his union activities. There is no evidence that the Respondent issued any other discipline to a pot carrier operator for a reason even remotely resembling the warning given to Leslie from the time it began operations in June 2013 until the time of the hearing in August and September 2014. Accordingly, I find that the Respondent has not established a valid *Wright Line* defense sufficient to overcome the General Counsel's strong prima facie case and therefore I find that the written warning given to Lesslie on December 6, 2013, violates Section 8(a)(3) and (1) of the Act.

I also find that the Respondent has not established a valid *Wright Line* defense to the allegation that the suspension issued to Lesslie on December 6 is also a violation of Section 8(a)(3) and (1). As noted above, the failure to conduct any investigation into the circumstances surrounding Lesslie's actions and to give him an opportunity to attempt to explain his conduct is significant evidence of discriminatory motivation. *Publishers Printing Co*., supra. At the trial, Teeter conceded that under certain circumstances the use of hot slag may be warranted but that the decision to do so should be made by the lead man and not the pot carrier operator. Teeter's testimony establishes therefore that the allegedly insubordinate act for which Lesslie was suspended was the decision he made to request the pit loader operator to use hot slag in lining the pot, without obtaining prior approval from his leadman. I find that the credited testimony establishes that Lesslie did seek permission before requesting Allison to put hot slag in the pot, but did not get a clear response from Knuth. Thus, the lack of any investigation into the circumstances surrounding Lesslie's actions in this case clearly establishes discriminatory motivation. I also note that there is evidence of disparate treatment in that the other employee involved in putting hot slag into the pot, Allison, was not given any discipline for his role in this matter, even though Knuth admits that he instructed Allison to use only medium slag at the beginning of the shift. The fact that the Respondent issued written rules regarding the use of slag to line the pots only after the suspension given to Lesslie establishes that there was ambiguity under what conditions pot carrier operators could use hot slag, rather than medium slag, to line their pots. Based on the foregoing, I find that the Respondent has not established that it would have suspended Lesslie for requesting Allison to put hot slag into his pot during the December 3-4 shift, in the absence of his union activities. Accordingly, I find that the suspension issued to Lesslie on December 6, 2013, violates Section 8(a)(3) and (1) of the Act.

While the record is not entirely clear regarding the details on this point, the testimony of Lesslie and Teeter establishes that Lesslie was not permitted to work his scheduled overtime during the period that he was suspended. (Tr. 404, 1047.) Since I have found the suspension to be a violation of Section 8(a)(3) and (1), the refusal to permit Lesslie to work scheduled overtime as a result of his suspension is also a violation of Section 8(a)(3) and (1) of the Act.

The Allegation that the Respondent Interrogated and Threatened Lesslie in January 2014, Regarding His Participation in a NLRB Investigation

Paragraph 12(a) of the complaint of alleges that in January 2014, the Respondent, by Barnes and Teeter, interrogated and threatened employees regarding their participation in a Board investigation. This paragraph of the complaint also alleges that the Respondent created the impression among its employees that their Board activities were under surveillance.

On January 7, 2014, a subpoena was issued by Region 15 of the National Labor Relations Board (NLRB or the Board) directing Lesslie to appear before a Board agent on January 22 regarding the investigation of the charge in Case 15-CA-116456, which involved the discharge of Jacob Adams. (GC Exh. 17.)

Lesslie testified that In January 2014, employee Johnny Payne told Lesslie that employees employed by the Respondent at the Hickman facility were receiving subpoenas from the Board. Lesslie also testified that he had received notice of a certified letter but did not go to the post office and claim the certified mail. Shortly after Lesslie received notice of the certified

letter from the Board, Barnes and Teeter spoke to him while he was working near furnace 1. Barnes asked Lesslie if he had received a certified letter. Leslie replied "no." Teeter said that Lesslie would be the one who "double crossed them" if he picked it up. Leslie told them that he had not picked up the certified letter, as he still had the pink certified mail notice that he had received from the postal service. Teeter said that if he had not picked up the letter to bring him the certified mail notice to him the first thing the next day. Barnes and Teeter then left.

The next morning, Lesslie reported for work at 6 a.m. and did not immediately report to Teeter but rather went to his pot carrier at furnace 1. Barnes and Teeter came up to Lesslie in a company truck and Lesslie got down from his machine and walked up to them. Barnes asked Lesslie if he had the certified mail card. Teeter also asked him if he liked his job and that he could give them the card. Lesslie stated that that he comes to work and does his job. Barnes said that he could fire Lesslie for any reason he wanted or he could move him around and pay him what he wanted to. Barnes said he knew C crew had started the union movement and that he had "already busted us all up." Barnes said that if Lesslie did not believe he could do what he was saying "ask Chris Brothers and Jacob Adams." Teeter repeated to Leslie to bring the certified mail card in. Teeter said that they could move Lesslie to another job like they had done with Michael Jackson and that they could pay employees what they wanted to do and nobody could do anything about it. According to Lesslie, Barnes and Teeter made it clear to him that they wanted the certified mail notice card to prove that he had not picked up the subpoena and would not go to court to testify in Jacob Adams" case.

Lesslie took the certified mail notice out of his wallet and gave it to Teeter. Lesslie said, "I told you I did not pick it up." Barnes said that if he had picked it up and talked to the Labor Board or signed anything the "company's lawyers" would find out and then Teeter and Barnes would also know. Before the conversation ended, Teeter also asked if another named employee was involved in the union effort.

Teeter testified that in January 2014 Lesslie came to Teeter and told him that he had been subpoenaed by the Board. According to Teeter, Lesslie said he did not know what he was supposed to do. Teeter told him that he was going to have to go and talk to the Board because he had been subpoenaed. Teeter said he never requested Lesslie to bring in a copy of the subpoena or the certified mail notice for the subpoena. Teeter also testified that he never heard Barnes asked Lesslie to bring a copy of the subpoena or any related documents to him. Teeter also denied knowing that Lesslie had been subpoenaed before Lesslie came to speak with him. Teeter also claimed that he did nothing to prompt Lesslie to speak to him if he received a subpoena.

Barnes denied ever telling Lesslie to give him any subpoena that he received. He also denied telling Lesslie to give him the certified letter notice for any subpoena that he may received. Finally, he denied ever telling Lesslie or any other employee not to talk to the NLRB.

I credit Lesslie's testimony regarding the meeting he had with Teeter and Barnes in mid-January 2014. His testimony is detailed and his demeanor during this part of his testimony reflected a sincere desire to relate the details of this conversation to the best of his ability. I do not credit the denials of Teeter and Barnes. Teeter's testimony contained no details regarding the alleged meeting between him and Lesslie in which Lesslie again sought his advice about cooperating with the NLRB. I find it highly implausible that Lesslie would again seek Teeter's

counsel regarding whether he should cooperate with the NLRB after being subjected to additional unfair labor practices on the first occasion that he raised the issue of cooperating with the NLRB on December 6, 2013. Barnes' testimony denying that he had spoken to Lesslie at all about receiving an NLRB subpoena is cursory in nature and unconvincing.

Based on Leslie's credited testimony, I find that during this conversation the Respondent violated Section 8(a)(1) in the following respects. In context, Barnes' questioning of Lesslie as to whether he had received a certified letter could only be construed as asking Lesslie whether he had received the certified letter containing a subpoena from the NLRB. I find that questioning Lesslie regarding whether he had received a certified letter from the NLRB constitutes an unlawful interrogation regarding documents an employee received from the Board in violation of Section 8(a)(1) of the Act.

I find that Teeter's questioning of Lesslie the next day as to whether he liked his job coupled with a demand that Lesslie give the certified mail notice of the subpoena to Barnes and Teeter constitutes a threat of an unspecified reprisals if Lesslie did not provide the certified mail notice in violation of Section 8(a)(1) of the Act.. Teeter's questioning of Lesslie of whether another named employee was involved in the union effort is an unlawful interrogation regarding employees' union activities and also violates Section 8(a)(1) of the Act.

In the context of trying to obtain from Lesslie the certified mail notice which would reflect that Lesslie had not picked up the subpoena, Barnes' statement that he could fire Lesslie for any reason he wanted to or that he could move him around and pay him what he wanted to constitute unlawful threats of discharging employees, transferring employees, and reducing employees' pay because of their cooperation in a Board investigation in violation of Section 8 (a)(1) of the Act. Barnes statement that he and that he knew that C crew had started the union movement constitutes the creation of the impression that the employees' union activities were under surveillance in violation of Section 8(a)(1). His additional statement that he had broken up C crew and that if Lesslie did not believe he could do what he was saying to "ask Chris Brothers and Jacob Adams" constitutes a threat to discharge employees because of their union activities in violation of Section 8(a)(1) of the Act.

Teeter's statement that the Respondent could move Lesslie to another job like it had done with Michael Jackson and they could pay employees what they wanted to and nobody could do anything about it constitute unlawful threats of reducing the pay of employees and transfer employees if they cooperated with a NLRB investigation in violation of Section 8(a)(1). Finally, Barnes' statement if employees picked up their subpoenas and talked to the Labor Board or signed anything the "company's lawyers" would find out and then the Respondent will also know constitutes an unlawful creation of the impression that employees contacts with the Board were under surveillance in violation of Section 8(a)(1) of the Act.

Lesslie's February 7, 2014 Demotion

Facts

Lesslie reported for work at 6 p.m. on February 3 but left early because of illness.[40] On February 4, 2014, Lesslie was seen in the emergency room of the Twin Rivers Regional Medical Center. He received a work release form indicating that he was seen on that date and was diagnosed with influenza. The form indicated that he would be able to return to work on February 7, 2014. (GC Exh. 24.) On February 4 at 1:48 p.m., Lesslie sent a text message to Teeter (R. Exh. 17D) indicating:

> I'm headed that way just got a breathing treatment and I got paperwork from dr where I have the flu and I'm very contagious rite now with high fever and dizzy! But I'm headed that way on sheet of ice and freezing to death.

On Thursday, February 5, 2014, at 7:39 p.m., Teeter received two text messages from Lesslie (R. Exh. 17E).[41] The first one, while lengthy, is set forth in its entirety because of its role in the later discharge of Lesslie. The first email states:

> Katie told me wat y'all said, scared scared!!! Listen to me very carefully I said after dad died and y'all pulled y'all's BS not to speak to come around me again and I was sick and never heard nobody knocking and you and your thug's buddy's are so lucky cause I'm gonna blow your fuckin brains out rite where you stand because I promise you that the knife you've got in your hand I will feel threatened by it and all the threats y'all's makin about sending somebody to look me up, I wish you would I swear to god I'm gonna feel scared for my life and I'm gonna fuckin kill who you send, I'm so fuckin tired of this harassment I'm gonna snap!!! So you no this I'm not your family Y'all was my dead dad's family and think about it long and hard if your life and mine is worth this BS over shit I've not got!!! Keep telling ppl I've got the gold watch and chains and I'm gonna cause you more fuckin problems than you ever seen and don't think you're the only person that nos a crack head that can make shit happen (take that how ya want) and FYI I've done spoke to the chief and nobody better come to my house!!! And I don't give a fuck if you show this to cops matter of fact I hope you do that away there is a record that you've been warned!!! Stay away from me and my home!!! And if I hear that y'alls's makin threats toward my son I'm gonna just plainly make you and your whole family and that new born go bye bye!!! Take it how

[40] GC Exh. 42 is a summary of all of Lesslie's attendance and discipline occurrences from June 1 of 2013 through February 7, 2014. This document reflects under the date of February 3, 2014 "1:30 AM turned down offer to emergency room" I find, based on this document, Lesslie's testimony and the record as a whole, that Lesslie reported for work at 6p.m. on February 3 and left in the early morning hours of February for due to illness.

[41] Teeter testified that he received these text messages from the same phone number that he had previously received a text message is from Lesslie. Teeter's testimony is corroborated by the fact that the phone number that he received a text message from is the same phone number that Lesslie put on his union authorization card. (GC Exh. 47.) At the trial, Lesslie denied sending the first text message. I find Lesslie's testimony on this point is not credible because it is contradicted by objective testimony.

> you want mf!!! I'm tired and full up from this harassment and threatin calling my dr and po they already how I feel about this fear so best leave me be!!! Plz Plz

Shortly thereafter, Teeter received another text message from Lesslie. The second message stated:

> Idkn wat to say Chris . . . Sorry I hit wrong Chris button, I apologize very very embarrassed!

After receiving the first email, Teeter called Barnes about it and then sent the first email to Klee. After reading it, Klee spoke to Teeter by phone and told Teeter that she thought the Respondent needed to terminate Lesslie for the email. Teeter then told Klee that he had just received another text message from Lesslie saying that the first email was not intended to be sent to him but rather was sent by mistake. Teeter told Klee that he would like to talk to Lesslie about it. On February 6, Klee, Barnes, and Teeter decided to discuss the text message at a meeting they determined they would hold with Lesslie on February 7 regarding his attendance.[42]

From February 4 through 6, 2014, Lesslie was off of work due to illness. When he arrived at work he was instructed to report to the Respondent's office. Lesslie did so and met witht with Barnes, Teeter, and Ross in the Respondent's conference room at the Hickman facility. Lesslie testified that at the meeting Barnes told him that he was being demoted from a pot carrier to a pressure washer because he had missed 27 days. Lesslie was given written notice of this action on a corrective disciplinary form dated February 4, 2014 (GC Exh. 19) which indicated the following:

> Brandon came in to work at 6:00 PM for night shift but left four and 1 half hours early leaving Phoenix at risk with one pot carrier short.
>
> Do (sic) to the fact that Brandon has left work early, absent, or been late 27 times since 6/1/13. Phoenix finds it necessary to reassign Brandon's position. Effective emmediately (sic) Brandon's new position will be power washer.[43]

Lesslie stated at the meeting that he did not believe that he missed that many days and that the Company did not have an attendance policy. Lesslie was shown the new attendance policy (GC Exh. 11), and was informed that it was starting on February 17 and that everybody would have "clean slate." Lesslie became very emotional and begged to stay on the pot carrier. He was told that he could work his way back to that position. It is undisputed that during this meeting Lesslie was not shown any records of the times that he allegedly had been absent or left work early. Lesslie was instructed to report to his new position as a pressure washer on Monday, February 10.

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[42] I do not credit Leslie's testimony that he spoke to Teeter on the phone at some point between the time that Teeter had received a text message on February 5 and 7 and that Teeter told him that the text message was "no big deal". While I have credited much of Lesslie's testimony in this proceeding, I find his testimony with regard to the circumstances surrounding this text message is not credible. With respect to this issue, I believe that Lesslie testified in a manner that he believed would better support his position.

[43] This position involves cleaning the Respondent's equipment with a pressure washer.

After the discussion regarding Lesslie's attendance and his demotion to pressure washer, Teeter asked Ross to leave the room. Teeter then presented another corrective disciplinary form that was dated February 7, 2014 (GC Exh. 22). This document indicated:

> Sending a text message intended for someone else to Chris Teeter, I understand and appreciate that you are embarrassed by the mistake but I can not unread the content of the message. It is very private family matter that will remain between us.

Under the disciplinary action to be taken the document indicated "NA." Teeter testified that he told Lesslie at the meeting that the text message that he received was pretty graphic and disturbing. He told Lesslie that he understood that Lesslie was embarrassed and that it was a personal matter. Teeter said he understood that the text message was sent accidentally to him and that he was not going to discuss the details of the text. Teeter indicated, however, that he was "a little bit alarmed" by it. (Tr. 1061.) Teeter acknowledged at the trial that he told Lesslie that he was not in trouble for sending the text message. Teeter told Lesslie, "I just wanted us to talk about it in a formal setting here so that we both know that this happened and, you know, it is behind us, do not worry about it." Teeter also told Lesslie, "If you need some help, we can get you some help." (Tr. 1062.) Teeter testified that this was not discipline but the corrective disciplinary form was merely used to document that there was a discussion about the text message that Teeter had received. (Tr. 1066-1067)[44]

Lesslie refused to sign either the written notification of his demotion or the document making reference to the text message. Barnes, Teeter and Ross signed the notice of Lesslie's demotion while Teeter signed the document memorializing the text message.

Barnes, Teeter, and Ross testified briefly with regard to the attendance issues that were discussed at the meeting with Leslie held on February 7. None of their testimony contradicted that of Lesslie's. Since Lesslie's testimony is far more detailed regarding that portion of the meeting, I find that it is the more reliable account of what occurred.

The personnel action form regarding Lesslie's demotion from a pot carrier operator to a pressure washer reflects that the change in the rate of pay was from $18.14 an hour to $14 an hour. The personnel action form is dated February 4, 2014, and was signed by Barnes and Cunningham on that date (GC Exh. 20.) The record also establishes that there are far less opportunities for overtime for a pressure washer as compared to a pot carrier operator. There is no evidence that Lesslie was ever given any kind of warning that his attendance could lead to a demotion or other discipline.

With respect to the Respondent's asserted reason for demoting Lesslie from pot carrier operator to pressure washer, Klee testified that he was visiting the Hickman facility for the first time on February 2-6, 2014, and conducted an audit of the employees' attendance files. Klee found that timecards were in the employee files and suggested to the administrative assistants

[44] Since the evidence does not establish that this documentation of the email that Leslie mistakenly sent to Teeter constitutes discipline, I dismiss paragraph 14(f) alleging that a written warning was issued to Leslie in violation of Section 8(a) 4), (3), and (1).

that a spread sheet for each employee should be maintained in order to keep better track of attendance. While Klee was reviewing these files, she determined that Lesslie had 27 attendance "incidents." Klee discussed the matter with Barnes and learned that there was no written attendance policy in place at the Hickman facility. Klee gave Barnes a copy of the Respondent's standard attendance policy and they decided that employees would be notified of the implementation of this policy at the Hickman facility and that it would go into effect on February 17. Barnes and Klee also determined that everyone was going to receive amnesty and start with a fresh record on that date.

According to Klee, during her discussion with Barnes and Teeter, it was determined that Lesslie's attendance had caused morale issues because he would not show up for work when he was supposed to and other employees had to cover his shifts. Klee testified that Barnes made the decision to put Lesslie in a position that would not be detrimental to production. Klee testified that she wished to speak to Lesslie about the matter but that he was absent due to illness. Klee left the facility on February 6 before the meeting with Lesslie was held on February 7.

Barnes testified that because Lesslie was having so many attendance occurrences a decision was made to move him from a pot carrier to a pressure washer. Barnes said he spoke to Teeter, Ross, Klee, and Cunningham about this decision. Teeter testified that Lesslie's attendance was an ongoing problem and that a discussion was held with Klee regarding his attendance and decision was made to transfer Lesslie to a position that would not be impacted as much if he was not present.

Analysis

As I have noted above, the General Counsel has established a prima facie case under *Wright Line* with regard to adverse actions taken against Lesslie. In this regard Lesslie was an open union advocate and it is undisputed that Barnes and Teeter were aware of that support. I find that Klee was also aware of Leslie's support for the Union at the time of his demotion. As I have previously noted, supervisory knowledge of the union activity of an employee is imputed to higher-level supervisors, absent credible evidence to the contrary. *State Plaza Hotel*, supra. I note that in her testimony Klee did not specifically deny knowledge of Lesslie's union activities at the time of his demotion. With regard to animus, Lesslie was the victim of many of the unfair labor practices committed by the Respondent. I note in particular with regard to this allegation that the Respondent, through Barnes, told Lesslie in October 2013 that it could move employees who supported the Union to other positions and pay them less and there was nothing anybody could do about it.

I find that the Respondent has not established a valid *Wright Line* defense to the allegation that Lesslie was demoted with a loss of pay on February 7, 2014, in violation of Section 8(a)(3) and (1) of the Act. The Respondent did not speak to Lesslie about his attendance prior to deciding to demote him to a position that paid less and had less opportunity for overtime. Clearly, Lesslie's transfer to a pressure washer position was disciplinary in nature. As noted above the Board has found that an employer's failure to conduct a fair and full investigation and give an employee the opportunity to explain his or her actions before imposing discipline is a significant factor in finding discriminatory motivation. *Publishers Printing Co.*, supra. In addition, the Respondent had no written rules regarding attendance in effect at the time of

Lesslie's demotion. The Respondent implemented an attendance point system shortly after Lesslie's demotion that became effective on February 17. All existing employees received amnesty for attendance issues and started with a clean slate on February 17. The fact that the Respondent decided to demote Lesslie for his attendance at the same time it indicated it would give amnesty to all other employees establishes that Lesslie was treated disparately from other employees.

With regard to the summary of attendance occurrences that the Respondent allegedly relied on determining that Lesslie should be demoted (GC Exh. 42), five of those occurrences involved forgetting to clock in or out. There is no evidence that Lesslie did not in fact work a full shift on those dates. Of the remainder of the occurrences noted, the summary reflects only the following handful of unexcused absences: September 22, 2013 "left early"; October 6, 2013, "unexcused: Ronnie"; November 11, 2013 "tardy"; February 2 "called off"; and February 4 through February 6 "unexcused." There is no evidence to establish that the other attendance occurrences contained in the summary were unexcused and I find, therefore, that they were, in fact, excused.

In addition, the record as a whole demonstrates that the summary is not accurate in all respects and therefore I give it limited weight. The summary reflects that Lesslie received a written warning for reporting late to work on October 19, 2013. Lesslie credibly testified, however, that he never received the warning dated October 19, 2013, and that it is unsigned by either anyone in management or by him (GC Exh. 46).While the summary reflects unexcused absences for Lesslie from February 4-6, 2014, on February 4, Lesslie sent a text message to Teeter indicating that he had a doctor's excuse and Lesslie, in fact, presented that excuse on February 7, 2014. (GC Exh. 24.) There is no evidence to indicate that prior to the implementation of the Respondent's attendance policy on February 17, 2014, a doctor's excuse for an absence was not accepted as a valid reason for the absence.

While the summary reflects that Lesslie received warnings for leaving early on September 22, 2013, and for being unexcused on October 6, 2013, I note that the Respondent does not direct my attention in its brief to any such warnings and my review of the record does not reveal that it contains any such warnings. I find, therefore, that the summary is also not accurate on this point.

Importantly, the Respondent has not introduced any evidence that prior to Lesslie's demotion on February 7, another employee was disciplined in a similar manner for attendance. The lack of evidence indicating that the Respondent treated any other employee in a similar fashion is further indicative of a discriminatory motive. It is clear that prior to the implementation of the attendance policy in February 2014, the Respondent had an undefined and casual approach to attendance. I am convinced that the Respondent seized on Lesslie's allegedly poor attendance record to mask its discriminatory motive to penalize him for his continued support for the Union. While the record establishes that Lesslie may have had four unexcused absences, it is not enough for the Respondent to show that it had some justification for taking disciplinary action against Lesslie. Rather, it is the Respondent's burden to establish that it would have taken the disciplinary action against Lesslie regardless of his union activity. *Garvey Marine, Inc*., 328 NLRB 991, 992 (1999). I find that the Respondent has failed to meet its burden under *Wright Line* and conclude that Lesslie's demotion on February 7, 2014, violated Section

8(a)(3) and (1). Because I find that the Respondent's demotion of Lesslie from a pot carrier operator to a pressure washer was unlawful, I also find that the corresponding reduction in pay and changed hours also violates Section 8(a)(3) and (1) of the Act.

Lesslie's Suspension and Discharge

Facts

Teeter credibly testified that on the evening of February 7, 2014, he walked out the back door of his house and observed Lesslie sitting in a white Lexus SUV in the parking lot of a church across an alley at the back of Teeter's home. Teeter testified it was approximately 5 or 5:30 p.m and it was still daylight. Teeter testified that Lesslie was probably 300 to 400 feet away from his home. When Lesslie observed Teeter looking at him, he pulled out of the church parking lot and left. Lesslie did not speak to Teeter nor did he make any gestures. Approximately 45 seconds elapsed from the time that Teeter first observed Lesslie until he left. After observing Lesslie, Teeter called Barnes and reported the incident to him. On Monday, February 10 at 10:45 a.m. Teeter also filed a police report regarding his observation of Lesslie near his home with the Steele, Missouri police department. (R Exh. 37.)[45]

Ross credibly testified that on Saturday evening, February 8, he was returning to his home in Kennett, Missouri, with his wife when he observed a white Lexus SUV driving toward him on a street near his home. The white Lexus then stopped at an angle in the street. As Ross drove closer to the vehicle he recognized Lesslie and Ross stopped his truck. Ross observed Lesslie get out of his vehicle and walk to the back of the car. At that point, Ross began to back his truck up. As he did so, Ross observed one of his neighbors come up behind Lesslie's vehicle. Ross then observed his neighbor and Lesslie push Lesslie's vehicle to the side of the road. Ross then began to move forward and, as he drove by Lesslie's vehicle, he observed Lesslie in the driver's seat making a motion like he was attempting to start the vehicle with the key. Lesslie did not speak to Ross nor did he make any gestures toward him.

Ross testified that he called Teeter after this incident but could not recall what he told him.[46] On Monday morning, February 10, Ross reported seeing Lesslie near his home on February 8 to Teeter and Barnes. On February 10 at 11: 37 a.m., Ross filed a police report with

[45] I find Teeter's testimony regarding this issue to be credible. His testimony was detailed and consistent and his demeanor reflected truthfulness with respect to this portion of his testimony. I also note that Teeter's trial testimony is consistent with the police report that he filed on October 10.I do not credit Lesslie's testimony that he was not in the area of Teeter's home on or about February 7. Lesslie testified that he had never been to Teeter's home and did not even know where he lived. Teeters uncontradicted testimony establishes, however, that Lesslie had been to his house on a prior occasion with a friend in order to show Teeter a vehicle that he was interested in purchasing from Leslie's friend. I also note that Lesslie admitted to owning a white Lexus SUV. Lesslie appeared very nervous while testifying regarding this event was and his demeanor reflected insincerity in my view.

[46] Teeter testified that Ross sent him a text message on February 8 telling him that last night was his turn and Saturday night was Ross' turn to have a visit from Lesslie. Teeter further testified that the following Monday, February 10, Ross reported the details of Lesslie's appearance near his home to him and Barnes. I credit Teeter's testimony on this issue as he seemed to have much more specific recall of how Ross initially reported seeing Lesslie near his home on February 8 than did Ross.

the Dunklin County, Missouri Sheriff's office regarding observing Lesslie near his home on February 8.

Bruce Wallace testified that he is the next-door neighbor of Ross. At the trial, Wallace identified Lesslie from a photograph he was shown. (R. Exh. 18.) According to Wallace, on the evening of February 8 at approximately 7p.m. he observed a white SUV in his driveway. Wallace thought it was his girlfriend who has a white SUV. When no one came to the door in approximately 5 minutes, Wallace looked in his driveway again and observed the white SUV leave his driveway. Shortly afterwards, Wallace left in his car and observed the same white SUV, which he now recognized as a Lexus, parked near the center of the street. Wallace stopped behind the vehicle and asked Lesslie if he needed help to push his vehicle off to the side. Lesslie said he did as his vehicle had stalled. Wallace also asked Lesslie why he was sitting in his driveway, but Lesslie mumbled something that Wallace did not hear. As Wallace and Lesslie pushed the vehicle to the side of the road, Wallace observed Ross approach but then stopped and begin to back up. As Ross began to move forward again, Wallace then got back into his vehicle and left after Ross had passed by Lesslie's vehicle.

The testimony of Ross and Wallace is mutually corroborative and contains the type of detail that establishes a high degree of reliability. I credit their mutually corroborative testimony that Lesslie was in the area of Ross's home and, in fact, parked next-door to Ross's house for some period of time on February 8.

I do not credit Lesslie's testimony regarding his explanation for being in the area of Ross's home. Lesslie's demeanor while testifying about this issue was again not impressive and his explanation as to why he had been in Ross' neighborhood is entirely implausible. According to Lesslie, his grandmother had passed away during this time and the funeral home where her funeral service was held was in the neighborhood where Ross lives. Lesslie testified he drove past the funeral home and that was the only time that he had ever been in that area. Lesslie also admitted to having car trouble when he drove by the funeral home and that somebody helped him with his car. Objective evidence establishes, however, that the funeral of service for Lesslie's grandmother was held on February 25, 2014. (R Exh. 22; Tr. 521)

Barnes testified that on Friday night, February 7 he received a call from Teeter telling him that he had observed Lesslie behind his house. Barnes called Klee and informed her of this development. Klee told Barnes that she was going to talk to Respondent's counsel and to make sure that Teeter reported the matter to the police. Barnes then called Teeter back and told him to make a police report. According to Barnes, on Saturday night, February 8, Ross called him and reported to him that he had observed Lesslie near his home.[47] Ross then called Klee and reported to her that Lesslie had also been observed near Ross' home. Barnes testified that he believed it was during this conversation that Klee told him the Respondent was going to terminate Lesslie.

[47] I do not credit Barnes testimony on this point. Ross testified that he did not speak to Barnes about this matter until Monday, February 10. If Barnes knew of Lesslie being seen in the vicinity of Ross' home on February 8, he received that information from Teeter.

Barnes testified that on Sunday, February 9, he informed Cunningham about Lesslie's appearances near the homes of Teeter and Ross over the weekend. On direct examination by the Respondent, Barnes testified that the decision to terminate Lesslie was made between him, Klee, and Cunningham (Tr. 1147-1148).[48] Barnes did not testify, however, as to when this decision was made. According to Barnes, Teeter and Ross were kept out of this decision making process.

Klee testified that Barnes called her on Saturday night, February 7, and informed her that Teeter had seen Lesslie watching his home. The following night, February 8 Barnes called and reported to Klee that Ross had observed Lesslie near his home. Klee testified that she asked Barnes to tell Ross to file a police report. After speaking with counsel, Klee spoke to Barnes again on Sunday, February 9 and told him that it "it was in the best interest of our company and the safety of all employees that we terminate Brandon Leslie." According to Klee, she made the decision to terminate Lesslie.

On Monday, February 10, at 6 a.m. Lesslie reported for work in his new position as a pressure washer. When Lesslie arrived he was directed to go to the conference room to meet with Barnes. At the meeting, Barnes informed Lesslie that he was suspended for stalking Teeter and Ross. Barnes gave Lesslie a 5-day suspension notice (GC Exh. 23) which indicated:

> Due to your un-reliability with attendance we changed your job responsibilities Friday from pot carrier to pressure washer, since Friday you have harassed and stalked Chris Teeter and Mike Ross all weekend.

Lesslie denied that he had stalked anyone as he had been in the hospital over the weekend.[49] Leslie was then escorted from the facility

Klee credibly testified that Lesslie called her a day or two after he was suspended and asked her for another chance. Klee told him that there was a concern about him because he had shown up at his managers' homes on two different occasions. According to Klee, Lesslie said that he just wanted them to know how much he cared about his job and wanted it back. Klee said it did not come across that way, since he did not speak to them but was merely staring at their homes.[50] Klee ended this conversation by telling Lesslie that he did not appear to be happy in his job or with family matters and that perhaps he could use this as a way of moving on to a new environment.

Thereafter, the Respondent sent a letter to Lesslie dated February 14, 2014, advising him of his termination (GC Exh. 25). This letter is signed by Barnes and states, in relevant part:

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[48] I note that Barnes testified somewhat inconsistently on this issue since, when called as a witness by the General Counsel under 611(c), he testified that he alone made the decision to discharge Lesslie (Tr. 79).

[49] The testimony of Barnes and Lesslie is mutually corroborative on this point. At the trial, Lesslie admitted that he had not been in the hospital that weekend.

[50] I do not credit Lesslie's testimony regarding his conversation with Klee. In Lesslie's version of this conversation he persisted in his denial of being at the homes of Teeter and Ross. It appears to me that at the trial, Leslie continued this implausible denial because of a concern that an honest admission would be harmful to his case. I find Klee's version of this conversation much more plausible.

> This letter is to facilitate notification of termination of employment. Your employment with Phoenix Services LLC has been terminated effective, February 14, 2014 because we are aware of your making death threats and threats of serious harm.

At the trial, Klee testified that she drafted the termination letter. When asked what the reference in the termination letter to making death threats was about, Klee testified that it was the text message that Lesslie had sent to Teeter. Klee admitted at the time that she drafted the termination letter that Teeter had told her that Lesslie had mistakenly sent the email to him. Klee also testified that the reference to making threats of serious harm in the termination letter involved Lesslie's conduct in appearing near the homes of Ross and Teeter.

Analysis

In applying the *Wright Line* analysis to Lesslie's suspension and discharge, as I have noted previously in this decision, Lesslie was an open union advocate. It is undisputed that Barnes and Teeter were well aware of his support for the Union. As I have noted earlier, I find that Klee was also aware of Lesslie's support for the Union by the time of his discharge. I note that Klee did not specifically deny being aware of Lesslie's support for the Union but only testified that the decision to discharge him did not have anything to do with union activity. (Tr. 1355-1356.) I do not credit Klee's denial that Lesslie's discharge was not related to his union activity. I find that the record clearly supports that Lesslie's union activity was a substantial, motivating factor in his discharge. The Respondent's animus regarding the union activities of its employees is well established by the unfair labor practices it committed and its specific animus toward the union activities of Lesslie is demonstrated by the series of unfair labor practices that were directed at him. Accordingly, I find that the General Counsel has established a strong prima facie case that the suspension and discharge of Lesslie was motivated by his union activities.

Turning to the Respondent's defense, the Board has long held that an employer does not meet its burden of persuasion under *Wright Line* by merely showing that it had a legitimate reason for imposing discipline on an employee, but must show by a preponderance of the evidence that it would have taken the same action without regard to the protected conduct of the employee. *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enfd. 942 F.2d 1140 (7th Cir. 1991); *Centre Property Management*, 277 NLRB 1376 (1985).

In the instant case, the Respondent relies on Lesslie's appearance near the homes of Teeter and Ross over the weekend of February 8-9, 2014, as constituting "threats of serious harm" that warrant discharge. I note that Lesslie did not orally threaten Teeter or Barnes or make any threatening gestures toward them, but rather was observed in the area near their homes. There is no evidence that prior to this incident, Lesslie had engaged in any acts of violence or threats of violence against Teeter, Ross, or any other coworker.

While I do not condone, in any way, his conduct in appearing at their homes, I note that he did so shortly after being demoted from his position as a pot carrier operator for discriminatory reasons. While admittedly Lesslie's appearance at the homes of Teeter and Ross was somewhat disconcerting, there is no evidence that Lesslie's motivation in going there was to cause them harm. The only evidence of Lesslie's motivation is his statement to Klee after he was

suspended that he went there to talk to Teeter and Ross about being given another chance to continue as a pot carrier. It is clear that Lesslie could not bring himself to speak to them, however, as he attempted to leave hurriedly when he actually saw them. I also note that neither Ross nor Teeter made a police report immediately after observing Lesslie near their homes, but rather did so on Monday morning, February 10, after Lesslie had been suspended.

The Respondent also relies on the text message that Lesslie mistakenly sent to Teeter on February 5 in support of its decision to discharge him. On February 7, however, the Respondent made the decision not to impose any discipline on Lesslie for sending the email by mistake to Teeter. Rather, Teeter told Lesslie that while he was somewhat alarmed by it, Lesslie was not in trouble for mistakenly sending it to him. It is clear that the email involved a family dispute and there is no evidence that Lesslie and Teeter are related. While the Respondent contends that Lesslie's subsequent actions in going to the homes of Teeter and Ross caused it to reconsider its position regarding the mistakenly sent email, it did so without giving Lesslie an opportunity to explain his conduct before making the decision to suspend and discharge him. According to Klee, the decision to suspend and discharge Leslie was made on Sunday, February 9. Under the circumstances, it appears that to rely on the mistakenly sent text message as a basis for Lesslie's discharge, after the Respondent had indicated it was imposing no discipline on him for doing so, suggests a discriminatory motivation. Also suggestive of a discriminatory motive is the conflict in the testimony between Barnes and Klee as to who made the decision to discharge Lesslie.

There is no evidence that the Respondent has discharged other employees for engaging in allegedly threatening conduct nor is there any evidence that the Respondent has excused such conduct in the past.

As I noted earlier, the General Counsel's prima facie case is a strong one, considering the substantial number of unfair labor practices that were directed toward Lesslie in an effort to dissuade him from supporting the Union. As I noted above, is not sufficient for the Respondent merely to show it would have been reasonable to suspend and discharge Lesslie for his actions, rather it must establish by a preponderance of the evidence that it would have suspended and discharged him for those reasons in the absence of his union activities. After considering all of the circumstances surrounding Lesslie's discharge, I find that the Respondent has not met that burden and accordingly find that Lesslie's suspension and discharge violates Section 8(a)(3) and (1) of the Act.

In reaching this conclusion, I find the cases relied on by the Respondent to be distinguishable. In *Stemilt Growers, Inc*., 336 NLRB 987 (2001) the Board found that the employer did not violate Section 8(a)(3) and (1) for discharging a known union supporter when the evidence established that the employee was discharged for intentionally pushing an 80-pound cart into another employee. After a full investigation, the employer determined that not only had the employee intentionally pushed the cart, but that another employee had also been discharged for the same offense. The employer's investigation further revealed that several employees had also been discharged for "fighting, horseplay or provoking a fight on company property". Id at 989. Under the circumstances, the Board found that the employer did not violate the Act but rather discharged the employee for the violent act of intentionally pushing his car into another employee, when it had a consistent policy of discharging employees for engaging in such conduct. In the instant case, there is, of course, no evidence of any overt violent activity.

Accordingly, I do not find that *Stemilt Growers, Inc*., supra, serves as a basis to dismiss the complaint allegation regarding Lesslie's suspension and discharge.

The Respondent also relies on *Clark v. Runyon*, 218 F.3d 915 (8th Cir. 2000), as supporting the lawfulness of its discharge of Lesslie. In the first instance, I note, with all due respect to the Court of Appeals for the Eighth Circuit, I am obligated to follow Board precedent, unless and until it is reversed by the Supreme Court, in deciding the allegations of the complaint. *Pathmark Stores, Inc*., 342 NLRB 378, 378 fn. 1 (2004); *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984). Moreover, I find that *Clark* is distinguishable from the instant case. In *Clark*, a case brought under Title VII of the Civil Rights Act of 1964, the plaintiff, an African-American female, asserted that she was terminated because of race and sex discrimination. The evidence revealed that the plaintiff had a prior history of physical assaults and threats against coworkers. After being transferred to another facility, the employer informed the plaintiff that there was zero tolerance for threats or violence and that if the plaintiff threatened another employee she would be terminated. Thereafter, the plaintiff threatened coworkers with bodily harm and was discharged. Under the circumstances the court found that the employer had a legitimate, nondiscriminatory reason for discharging the plaintiff for her threatened violence towards fellow employees.

I find the circumstances in the instant case far different from those presented in *Clark*. In the instant case, Lesslie did not engage in any violent conduct toward Teeter or Ross or make any threats against them. In addition, there was no history of Lesslie engaging in any violent or threatening conduct in the workplace.[51]

As set forth in detail above, I have found that the Respondent has violated Section 8(a)(3) and (1) of the by: on December 6, 2013, issuing Lesslie a written warning and 3-day suspension; on February 7, 2014, demoting Lesslie and reducing his pay and hours; on February 10, 2014, issuing him a 5 day suspension; and on February 14, 2014, discharging him. The complaint also alleges that the Respondent's conduct on those dates violated Section 8(a)(4) and (1) of the Act.

The General Counsel alleges that the Respondent took the adverse actions noted above against Leslie because he cooperated in Board investigations. The Board applies *Wright Line* deciding cases involving allegations of discrimination arising under Section 8(a)(4). *Grand Rapids Die Casting Corp*., 279 NLRB 662, 668, fn. 24 (1986).

I first address the allegation that the Respondent violated Section 8(a)(4) with regard to the disciplinary action it took against Lesslie on December 6, 2013. The evidence establishes that before receiving a disciplinary warning and suspension on December 6, Lesslie had voluntarily met with Barnes and Teeter and told them that he had been contacted by a Board agent but did

[51] The Respondent also relies on the Board's decision in *Wal-Mart Stores, Inc*., 341 NLRB 796 (2004) as supporting its position. In *Wal-Mart,* in the absence of exceptions, the Board adopted the administrative law judge's dismissal of the allegation that the employer unlawfully discharged employee Dennis Demint. Id. at fn. 2. The Board's adoption of a portion of the judge's decision to which no exceptions have been filed is not binding precedent in other cases. *Watsonville Register-Pajaronian*, 327 NLRB 957, 959 fn. 4 (1999); *Colgate-Palmolive Co*., 323 NLRB 515, 515 fn. 1 (1997). Accordingly, I have not accorded precedential value to that portion of the Board's decision in *Wal-Mart* stores, supra.

not wish to speak to her. During their conversation regarding cooperating with the NLRB, Barnes impliedly promised Lesslie the possibility of a promotion if he did not cooperate in an NLRB investigation. Later that day, but before being disciplined and suspended, Lesslie informed the Respondent that he had determined that he did not have to speak to the NLRB because it was only an investigation and that it was good news to him that he did not have to cooperate. Thus, at the time that Lesslie was suspended and disciplined on December 6, there is no evidence that he had, in fact, cooperated in an NLRB investigation and certainly the Respondent had no knowledge that Lesslie had cooperated with a Board investigation. In fact, the only knowledge that the Respondent had was that Lesslie was refusing to cooperate in the investigation. Accordingly, I find that under *Wright Line*, the General Counsel has failed to establish a prima facie case regarding this allegation and I shall therefore dismiss it.

Prior to disciplinary actions taken against Lesslie on February 7, 10, and 14, 2014, the Respondent interrogated and threatened Leslie in January 2014 regarding whether he participated in an NLRB investigation. At that time, Lesslie told Barnes and Teeter that he had not picked up the NLRB subpoena issued to him and produced to them the certified mail notice reflecting that he had not picked up the subpoena. Under these circumstances, there is again no evidence that Lesslie had begun to cooperate with an NLRB investigation and, of course, there is no evidence that the Respondent knew that he had cooperated in an NLRB investigation prior to issuing discipline to him on the dates noted above. Accordingly, I shall also dismiss these allegations in the complaint.

CONCLUSIONS OF LAW

1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by:

(a) Discriminatorily prohibiting employees from discussing the Union over the radio while permitting employees to discuss nonunion-related subjects.

(b) Coercively interrogating employees regarding their union activities.

(c) Threatening employees with discharge, the closure of the facility, layoffs, the loss of jobs, not receiving promotions, unspecified reprisals, transfers, or a reduction in pay, for engaging in union activities.

(d) Creating the impression that the union activities of employees was under surveillance.

(e) Telling employees that it would be futile to select a collective-bargaining representative.

(f) Impliedly threatening employees that the selection of a union would result in the closure of the facility, reduction of the number of employees, demotions, transfers, and reductions in the rate of pay.

(g) Soliciting grievances and promising to remedy them in order to discourage employees from supporting the Union.

(h) Posting jobs for positions in order to impliedly threaten employees with their removal from that position because of their support for the Union.

(i) Threatening employees with discipline for refusing to work a scheduled day off because of their union activities.

(j) Requesting employees to contact the Union and ask it to stop the union campaign.

(k) Implying that it would promote employees in order to encourage them not to cooperate in a National Labor Relations Board (NLRB) investigation.

(l) Interrogating employees about whether they have received documents from the NLRB.

(m) Impliedly threatening employees with unspecified reprisals if employees did not provide it documents they have received from the NLRB.

(n) Impliedly threatening employees with transfers and a reduction of pay if employees cooperated with an NLRB investigation.

(o) Threatening to discharge, transfer, and reduce the pay of employees if they refuse to provide it with documents they have received from the NLRB.

(p) Creating the impression that employees' contacts with the NLRB were under surveillance.

(q) Promulgating, maintaining, and enforcing rules prohibiting an employee from discussing employee information and discipline with "anyone."

(r) Maintaining and enforcing rules contained in its employee handbook prohibiting employees from "Conduct reflecting adversely on you or Phoenix Services LLC", and "Making or publishing false or malicious statements concerning an employee, supplier, client or Phoenix Services LLC."

(s) Maintaining a rule in its employee handbook prohibiting "Boisterous or disruptive activity in the workplace."

2. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by:

(a) Discharging Jacob Adams because of his union activity.

(b) Suspending Michael Emerson for 1 day on November 25, 2014; suspending him for 3 days on February 12, 2014; and issuing him written warnings on April 23, 2014, and August 7, 2014.

(c) Suspending Brandon Lesslie for 3 days on December 6, 2013, and refusing to allow him to work scheduled overtime during his suspension; issuing him a written warning on December 6, 2013; demoting Lesslie and reducing his pay and hours on February 7, 2014; issuing him a 5-day suspension on February 10, 2014; and discharging him on February 14, 2014.

3. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. The Respondent has not otherwise violated the Act

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged Jacob Adams and Brandon Lesslie, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The Respondent, having discriminatorily suspended Michael Emerson and Brandon Leslie, must make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The Respondent, having discriminatorily demoted Brandon Lesslie, must make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

I shall order the Respondent to compensate the above-named employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee, *Don Chavas, LLC, d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 *(2014).*

The standard remedy for the maintenance of an unlawful work rule is immediate rescission of the rule as this insures that employees may engage in protected activity without fear of being subjected to the unlawful rule. *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Pursuant *Guardsmark*, supra, the Respondent may comply with the order of rescission by rescinding the unlawful provisions in the applicable

document and republishing those documents without them. In recognition of the fact, however, that republishing the document could be costly, the Respondent may supply the employees either with inserts stating that the unlawful rules have been rescinded, or was new and lawfully worded rules on adhesive backing that will correct or cover the unlawfully broad rules, until the Respondent publishes the applicable document without the unlawful provisions. Any copies of the applicable documents that include the unlawful rules must include the inserts before being distributed to employees.

As part of the remedy in this case, the General Counsel requests that I order a responsible management official read the notice to assembled employees or at the Respondent's option to have a Board agent read the notice in the presence of a responsible management official. I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unlawful discharges and other unfair labor practices it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB No. 148, slip op. at 6-7 (2014); *Excel Case Ready* 334 NLRB 4, 4-5, (2001). In this regard, the Board has held that a public reading of the notice is an "effective but moderate way to let in a warming wind of information, and more important, reassurance." *Federated Logistics & Operations* 340 NLRB 255, 256 (2003) citing *J. P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539-540 (5th Cir. 1969). In the instant case, I find that the unfair labor practices of the Respondent justify the additional remedy of a notice reading. The Respondent responded to the Union's organizing campaign with extensive and serious unfair labor practices. In the first instance, as described above the Respondent engaged in numerous violations of Section 8(a)(1) of the Act. In addition, the Respondent unlawfully discharged two employee supporters of the Union, Adams and Lesslie and has unlawfully suspended the primary union adherent, Emerson, on two occasions. The Board has noted that the unlawful discharges of union supporters are highly coercive. *Excel Case Ready*, supra at 5. I find that a public reading of the remedial notice is appropriate here. The Respondent's violations of the Act are sufficiently serious and widespread such that a reading of the notice is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices. Accordingly, I will require the attached notice to the read publicly by the Respondent's representative or by a Board agent in the presence of the Respondent's representative.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

ORDER

The Respondent, Metal Services, LLC d/b/a Phoenix Services, LLC, Blytheville, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting employees from discussing the Union over the radio while permitting employees to discuss nonunion-related subjects.

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Coercively interrogating employees regarding their union activities.

(c) Threatening employees with discharge, the closure of the facility, the loss of jobs, not receiving promotions, unspecified reprisals, transfers, or a reduction in pay, for engaging in union activities.

(d) Creating the impression that the union activities of employees was under surveillance.

(e) Telling employees that it would be futile to select a collective-bargaining representative.

(f) Impliedly threatening employees that the selection of a union would result in the closure of the facility; that reduction of the number of employees, demotions, transfers, and reductions in the rate of pay.

(g) Soliciting grievances and promising to remedy them in order to discourage employees from supporting the Union.

(h) Posting jobs for positions in order to impliedly threaten employees with their removal from that position because of their support for the Union.

(i) Threatening employees with discipline for refusing to work a scheduled day off because of their union activities.

(j) Requesting employees to contact the Union and ask it to stop the union campaign.

(k) Implying that it would promote employees in order to encourage them not to cooperate in a National Labor Relations Board (NLRB) investigation.

(l) Interrogating employees about whether they have received documents from the NLRB.

(m) Impliedly threatening employees with unspecified reprisals if employees did not provide to it documents they have received from the NLRB.

(n) Impliedly threatening employees with transfers and a reduction of pay if employees cooperated with an NLRB investigation.

(o) Threatening to discourage, transfer, and reduce the pay of employees if they refuse to provide it with documents they have received from the NLRB.

(p) Creating the impression that employees' contacts with the NLRB were under surveillance.

(q) Promulgating, maintaining, and enforcing rules prohibiting an employee from discussing employee information and discipline with "anyone."

(r) Maintaining and enforcing rules contained in its employee handbook prohibiting employees from "Conduct reflecting adversely on you or Phoenix Services LLC," and "Making or publishing false or malicious statements concerning an employee, supplier, client or the Phoenix Services LLC."

(s) Maintaining a rule in its employee handbook prohibiting "Boisterous or disruptive activity in the workplace."

(t) Issuing written discipline to its employees, suspending its employees, demoting its employees and reducing their pay, or discharging its employees for engaging in union activities.

(u) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jacob Adams and Brandon Lesslie full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jacob Adams, Brandon Lesslie, and Michael Emerson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Jacob Adams, Brandon Lesslie, and Michael Emerson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Jacob Adams, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, suspensions, demotion and written warning issued to Brandon Lesslie, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge, suspensions, demotion, and written warning will not be used against him in any way.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions and written warnings issued to Michael Emerson, and within 3 days thereafter notify the employee in writing that this has been done and that the suspensions and written warnings will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days from the date of the Board's Order, rescind the provisions from its employee handbook prohibiting the following:

> "Conduct reflecting adversely on you or Phoenix Services LLC"
> "Making or publishing false or malicious statements concerning an employee, supplier, client or Phoenix Services LLC."
> "Boisterous or disruptive activity in the workplace"

As more fully set out in the remedy, furnish all employees with (1) inserts for the applicable document that advises that the unlawful rules have been rescinded; or (2) the language of lawful rules upon adhesive backing that will cover or correct the unlawful rules; or (3) publish and distribute the applicable document that does not contain the unlawful rules.

(i) Within 14 days after service by the Region, post at its facility in Blytheville, Arkansas, copies of the attached notice marked "Appendix."[53] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 18, 2013.

(j) During the time the notice is posted, the Respondent will hold a meeting or meetings, scheduled to ensure the widest possible attendance, to fully communicate with employees, at which the attached notice marked "Appendix" will be publicly read by a responsible management official of the Respondent or, at the Respondent's option, by a Board agent in the presence of a responsible management official.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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53 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., February 18, 2015

_____

Mark Carissimi
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discriminatorily prohibit employees from discussing the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union, AFL-CIO (the Union), or any other labor organization, over the radio while permitting employees to discuss nonunion related subjects.

WE WILL NOT coercively interrogate employees regarding their union activities.

WE WILL NOT threaten employees with discharge, the closure of the facility, layoffs, the loss of jobs, not receiving promotions, unspecified reprisals, transfers, or a reduction in pay, for engaging in union activities.

WE WILL NOT create the impression that the union activities of employees are under surveillance.

WE WILL NOT tell employees that it would be futile to select a collective-bargaining representative.

WE WILL NOT impliedly threaten employees that the selection of a union would result in the closure of the facility; that reduction of the number of employees, demotions, transfers, and reductions in the rate of pay.

WE WILL NOT solicit grievances and promise to remedy them in order to discourage employees from supporting the Union.

WE WILL NOT post jobs for positions in order to impliedly threaten employees with their removal from that position because of their support for the Union.

WE WILL NOT threaten employees with discipline for refusing to work a scheduled day off because of their union activities.

WE WILL NOT request employees to contact the Union and ask it to stop the union campaign.

WE WILL NOT imply that we will promote employees in order to encourage them not to cooperate in a National Labor Relations Board (NLRB) investigation.

WE WILL NOT interrogate employees about whether they have received documents from the NLRB.

WE WILL NOT impliedly threaten employees with unspecified reprisals if they do not provide to us documents they have received from the NLRB.

WE WILL NOT impliedly threaten employees with transfers and a reduction of pay if they cooperate with an NLRB investigation.

WE WILL NOT threaten to discharge, transfer, and reduce the pay of employees if they refuse to provide us with documents they have received from the NLRB.

WE WILL NOT create the impression that employees' contacts with the NLRB are under surveillance.

WE WILL NOT promulgate, maintain, and enforce rules prohibiting an employee from discussing employee information and discipline with "anyone."

WE WILL NOT maintain and enforce rules contained in our employee handbook prohibiting employees from "Conduct reflecting adversely on you or Phoenix Services LLC", and "Making or publishing false or malicious statements concerning an employee, supplier, client or Phoenix Services LLC."

WE WILL NOT maintain a rule in our employee handbook prohibiting "Boisterous or disruptive activity in the workplace."

WE WILL NOT issue written discipline to our employees, suspend our employees, demote our employees and reduce their pay, or discharge our employees for engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Jacob Adams and Brandon Lesslie full reinstatement to their former jobs or, if those jobs no longer exist, to

substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jacob Adams, Brandon Lesslie, and Michael Emerson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL compensate Jacob Adams, Brandon Lesslie, and Michael Emerson for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jacob Adams, and WE WILL within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge, suspensions, demotion, and written warning issued to Brandon Lesslie, and WE WILL within 3 days thereafter notify the employee in writing that this has been done and that the discharge, suspensions, demotion and written warning will not be used against him in any way.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and written warnings issued to Michael Emerson, and WE WILL within 3 days thereafter notify the employee in writing that this has been done and that the suspensions and written warnings will not be used against him in any way.

WE WILL within 14 days from the date of the Board's Order, rescind the provisions from our employee handbook prohibiting the following:

> "Conduct reflecting adversely on you or Phoenix Services LLC"
> "Making or publishing false or malicious statements concerning an employee, supplier, client or Phoenix Services LLC."
> "Boisterous or disruptive activity in the workplace"

WE WILL furnish you with (1) inserts for the applicable document that advises that the unlawful rules have been rescinded; or (2) the language of lawful rules upon adhesive backing that will cover or correct the unlawful rules; or (3) publish and distribute the applicable document that does not contain the unlawful rules.

METAL SERVICES, LLC d/b/a PHOENIX SERVICES, LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413

(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-116456 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.